89-1942

No. 89-

IN THE

UNITED STATES SUPREME COURT

October Term, 1989

HERMAN BLOOM and HERBERT K. FISHER,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

JOINT PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Electronic surveillance was conducted on the authority of a Title III extension "order" that the Judge cannot have read before signing, and the monitoring agents cannot have read before executing, since the "order" lacked an entire middle page, critical to its comprehensibility.

(a) Is such an order "insufficient on its face" under 18 U.S.C. §2518(10)(a)(ii), requiring suppression under §2515, especially where, *inter alia,* as a result of the missing page, the "order" had no decretal "it is ordered" language?

(b) Were the conversations that were thus recorded [i] "unlawfully intercepted" under 18 U.S.C. §2518(10)(a)(i), requiring suppression under §2515, because such an "order" was not "grant[ed]" by a "judge," as required by §2516(1), and [ii] "intercept[ed] in violation of" Title III, *id.* §2511(1)(c), and not "intercept[ed] . . . in conformity with the order of authorization or approval," §2518(10)(a)(iii), because the monitoring agents could not have been guided by a court order if they had not read that document with sufficient care to notice it was patently defective?

(c) Did the surveillance conducted under this "order" violate the Fourth Amendment because [i] the judge's signing the defective "order" without reading it shows that he "serve[d] merely as a rubber stamp for the police," *United States v. Ventresca,* 380 U.S. 102, 109 (1965), and [ii] the monitoring agents' failure to notice that the "order" was patently defective shows that they did not "observe precise limits established in advance by a specific court order," *Katz v. United States,* 389 U.S. 347, 356 (1967)?

2. Where there is no conspiracy conviction and no *Pinkerton* instruction to the jury, does evidence that one defendant acted on behalf of another in committing an offense justify the conviction of the second on an aiding and abetting theory, in the absence of any action or participation by the latter?

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LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (Herman Bloom, Herbert K. Fisher, and the United States). Seventeen codefendants were indicted in the district court; all were severed from these petitioners and some appealed separately.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

HERMAN BLOOM and HERBERT K. FISHER respectfully petition this Court for a writ of certiorari to review the judgments and memoranda of the United States Court of Appeals for the Third Circuit entered on February 8, 1990, affirming their convictions in the Eastern District of Pennsylvania on one count of giving or offering a kickback in connection with the operation of an employee benefit plan.

OPINIONS BELOW

The memoranda of the United States Court of Appeals for the Third Circuit on appeal after conviction, filed on February 8, 1990, are not published. They are noted at 898 F.2d 142 (Bloom) and 898 F.2d 143 (Fisher) (3d Cir. 1990) (table). The memoranda are reprinted as Appendix A (Bloom) and B (Fisher) to this petition. Judgment of affirmance was entered that day. App. C. Rehearing was denied on March 13, 1990. App. D.

The principal opinion of the District Court (Giles, J.), dated June 25, 1987, denying the motions to suppress is not published. It appears, in pertinent part, as Appendix E. A related pretrial opinion, dated June 29, 1988, denying a renewed motion to suppress (Katz, J.) is published *sub nom. United States v. Fisher*, 692 F.Supp. 488 (E.D.Pa. 1988). It appears in the Appendix as App. F. Another district court pretrial opinion, not pertinent to this petition, is published at 692 F.Supp. 495. An interlocutory appeal from that order was dismissed for lack of appellate jurisdiction; that opinion is published as *United States v. Fisher*, 871 F.2d 444 (3d Cir. 1989). The same electronic surveillance challenged in this petition was also at issue in *In re Grand Jury Matter (John Doe)*, 798 F.2d 91 (3d Cir. 1986) (petitioner Fisher being the John Doe in that case), and in *United States v. Traitz*, 871 F.2d 368 (3d Cir. 1989), *cert. denied*, 107 L.Ed.2d 44 (Oct. 2, 1989) (No. 88-2053).

JURISDICTION

Separate judgments of the United States Court of Appeals for the Third Circuit affirming the petitioners' convictions on direct appeal were entered February 8, 1990. Rehearing was denied on March 13, 1990. This petition is filed within 90 days of that date. Rules 13.1, 13.4 (1990 rev.). Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1254(1).

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

Title 18, United States Code, provides, in pertinent part:

§1954. Offer ... to influence operations of employee benefit plan

Whoever being –

> (1) an administrator, officer, trustee, ... agent or employee of any employee welfare benefit plan; or
>
> * * * *
>
> (3) an officer, ... or employee of an employee organization any of whose members are covered by such plan; ...
>
> * * * *
>
> receives or agrees to receive ... any fee, kickback, ... [or] money ... because of or with intent to be influenced with respect to, any of his actions, decisions or other duties relating to any question or matter concerning such plan or any person who directly or indirectly gives or offers, or promises to give or offer, any fee, kickback, ... [or] money prohibited by this section, shall be fined ... or imprisoned ... or both ....

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub.L. 90-351, codified at 18 U.S.C. §§2510-2521, provides, in pertinent part:

§2511. Interception and disclosure of ... oral ... communications prohibited

> (1) Except as otherwise specifically provided in this chapter any person who –

(a) intentionally intercepts ... any ... oral communication; [or]

* * * *

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any ... oral ... communication, knowing or having reason to know that the information was obtained through the interception of a[n] ... oral ... communication in violation of this subsection; ...

* * * *

shall be punished ....

§2515. Prohibition on use as evidence of intercepted ... oral communications

Whenever any ... oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial ... in or before any court ...of the United States ... if the disclosure of that information would be in violation of this chapter.

§2516. Authorization for interception of ... oral ... communications

(1) ... a Federal judge of competent jurisdiction ... may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of ... oral communications by the Federal Bureau of Investigation ... when such interception may provide or has provided evidence of [any of several federal felonies].

* * * *

§2517. Authorization for disclosure ... of intercepted ... oral ... communications

* * * *

(3) Any person who has received, by any means authorized by this chapter, any information concerning a[n]

... oral ... communication, or evidence derived therefrom[,] intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or that derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States ....

* * * *

(5) When an investigative or law enforcement officer, while engaged in intercepting ... oral ... communications in the manner authorized herein, intercepts ... oral ... communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom ... may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

§2518. Procedure for interception of ... oral ... communications

* * * *

(3) Upon such application [as is described in subsection (1)] the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of ... oral ... communications within the territorial jurisdiction of the court in which the judge is sitting ..., if the judge determines on the basis of the facts submitted by the applicant that –

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communication concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) ... there is probable cause for belief that ... the place where, the ... oral ... communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offenses, or are ... commonly used by such person.

(4) Each order authorizing or approving the interception of any ... oral... communication under this chapter shall specify –

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of ... the place where, authority intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communication, and of the person authorizing the application; and

(e) the period of time during which the such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

* * * *

(5) No order entered under this section may authorize or approve the interception of any .. oral ... communication for any period longer than is necessary to achieve the

objective of the authorization, or in any event longer than thirty days. ... Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. ...

(10)(a) Any aggrieved person in any trial ... before any court ... of the United States ... may move to suppress the contents of any ... oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that –

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

* * * *

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

This petition arises from the conviction of two attorneys under 18 U.S.C. §1954 for giving or offering a kickback to union officials in 1985 in connection with fiduciary decisions to be made concerning the operation of the union's legal services benefit plan. The evidence against them consisted almost entirely of conversations recorded by devices planted in the union's headquarters under a purported extension of a Title III authorization.

a. Procedural History

Petitioners Herman Bloom and Herbert K. Fisher were named in a 19-defendant indictment returned in the Eastern District of Pennsylvania on October 23, 1986, and charged with RICO and RICO conspiracy, 18 U.S.C. §§1962(c,d), with giving kickbacks to influence the operation of an employee benefit plan (*id.* §1954), and with aiding and abetting embezzlement from such a plan (*id.* §664). On May 14, 1987, the district court (Hon. Marvin Katz, U.S.D.J.) ordered a three-way severance of defendants, with these petitioners constituting one grouping. On June 18, 1987, petitioners were named in a superseding indictment against all the defendants, containing (as to them) similar charges to those contained in the initial indictment.

On January 21, 1988, an eight-count second superseding indictment was returned, naming petitioners Bloom and Fisher alone. This instrument, in Counts One and Two, charged both of them with RICO and RICO conspiracy. In Counts Three and Six, petitioners Fisher and Bloom were charged jointly with giving or offering a 10% kickback to Roofers Local Union 30/30B officials who were trustees of the Union's prepaid legal services plan, in connection with their law firm's role as providers of services under that plan, to influence the trustees' fiduciary decisions, and with aiding and abetting the embezzlement of that sum from the Fund by some of its trustees. The other counts charged Fisher alone.

Pretrial motions to suppress the fruits of electronic surveillance were filed in March 1987 and assigned, pursuant to Local Rule governing motions attacking the sufficiency of any order for electronic surveillance, to the judge who had approved the bugging of the union headquarters, where the conversations were overheard. That judge (Hon. James T. Giles, U.S.D.J.) heard argument and on June 25, 1987, issued a 99-page sealed opinion upholding the legality of the surveillance. Pertinent portions have been unsealed, and are appended as App. G.

One claim considered and rejected was that the order extending the bugging authorization for 30 days from October 24, 1985, was "insufficient on its face," 18 U.S.C.

§2518(10)(a)(ii), because it was missing the third of seven pages when submitted to and signed by Judge Giles and thus could not be read through logically, did not contain any decretal "it is ordered that" language, did not contain two of the four required findings under §2518(5), and did not contain language expressly authorizing any person or agency to conduct the surveillance in question. App. G(1). At the hearing, the prosecutor conceded that the page had not been there when the proposed order was presented to Judge Giles for his signature, and the judge admitted this must be true. 3d Cir. Supp. Appx. 8sa, 10sa.

Judge Katz later denied an evidentiary hearing on whether the agents conducting the surveillance had actually read and abided by the order, accepting instead the representation of the prosecutor that when the agents initialed the supporting affidavit, this meant they had also read the judge's order. 3d Cir. Appx. 190a. At the hearing, the judge stated a "finding" that the agents' initials "signifies that they read the entire package including the order of Judge Giles authorizing the surveillance and the application of the United States." App. F, at A-35. The court viewed this question solely as one of "minimization." *Id.*

Trial by jury commenced on June 5, 1989, and extended over seven days. At trial, evidence obtained under the authority of the challenged "order" was admitted and proved critical. On June 13, the jury returned verdicts of Not Guilty as to both petitioners on all charges but Count 3, which alleged the giving of a kickback to union officials in 1985 in violation of 18 U.S.C. §1954, which is the only conduct charged on which direct evidence on tape was offered.

On July 14, 1989, the lower court imposed sentence. Each petitioner was ordered imprisoned for one year and a day, and to pay a fine ($25,000 for Bloom; $125,000 for Fisher) and a $50 Special Assessment. Judgment was entered on July 19, and timely appeals were taken to the Third Circuit, which affirmed in separate, unpublished memoranda. App. A, B. Rehearing was denied, with only eight members of the en banc court participating, presumably due to the others' personal associations with the petitioners. App. D.

Petitioners' recognizance bonds were revoked after the affirmance of their convictions; they are serving their sentences in different federal institutions.

Showing of Lower Court Jurisdiction Under Rule 14.1(i): The United States District Court for the Eastern District of Pennsylvania had subject matter jurisdiction under 18 U.S.C. §3231, in that the indictment charged offenses against the United States allegedly committed within that District. The Court of Appeals' appellate jurisdiction rested upon 28 U.S.C. §1291.

b. Statement of Facts

Petitioners Herman Bloom and Herbert K. Fisher were partners in the Philadelphia law firm of Bloom, Ocks and Fisher, which held the contract from the mid-1970's through 1988 to provide legal services to members of the Roofers Union, Local 30/30B, under the union's prepaid legal services plan. This plan was funded by a ten cent per hour contribution for each hour worked by a union member under the collective bargaining contract. The indictment alleged that for several years the law firm kicked back ten percent of its fees received under the plan to the plan's union trustees.[1]

The trial consisted of the playing of two dozen tapes of conversations recorded in the office of Roofers Union Business Manager Stephen Traitz, Jr., with explanatory comments from an FBI Special Agent, and little else. In the tapes, Roofers officials are heard commenting on their expectation of obtaining money from petitioner Fisher – never from Bloom or from the firm – in an amount equal to a percentage of the firm's billings for the year to the Fund. *E.g.*, 3d Cir. Appx. 222-23a (T.6, 11/11 tape). After several delays, Fisher eventually delivered the cash in three $5000 installments on December 3, 9 and 17, 1985.

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1. The RICO count of the indictment alleged that this cash was then used by union officials to extend bribes or gratuities to local judges and other public officials, but the indictment did not allege, nor did the evidence show, that these petitioners knew of or participated in that conduct.

The sole evidence of personal involvement by petitioner Bloom was his presence during a meeting on November 21, 1985, in Traitz's office. 3d Cir. Appx. 236-81a. In that conversation, Bloom is heard twice attempting to get Traitz and Fisher to stop going on about local politics and to address some other topic, *id.* 245-46a, but it is not clear what that other topic might be. Bloom also appears to express concern that the room might be bugged, *id.* 242a, 249-50a. Finally, the two petitioners, speaking as one, bring up "that other thing" which is to occur in the middle of the following week. *Id.* 248a.

As recounted in the transcript provided to the jury as a listening aid, the critical 65 seconds of the November 21 tape were as follows:[2]

HF: * * * I've, we've got a little problem on –
HB: – on that other thing, yeah.
HF: It'll be here –
HB: – in the middle of the week, next week.
HF: Okay. And then –
ST: I have a record of what it is –
HF: [Unintelligible; hereafter "(UI)"]
ST: Because, are both our records right?
HF: It's... It's... am I right?
ST: I don't know. It's –
HF: Did you take a look at –
ST: It's 10%, right?
Yeah.
Yeah.[3]
ST: Okay, well I'll, I'll check with his –
HF: You, okay... We gave you two –
ST: Right.
HF: And then, I think, 1500 before during the year when you asked for it.

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2. The speakers were identified by an FBI Agent as Fisher (HF), Bloom (HB) and Traitz (ST). To avoid confusion, dashes are substituted here for the ellipses used by the government to indicate interruptions; asterisks are used to show omissions.

3. For the two "Yeahs" at this point, neither the identity of the speaker nor the number of speakers could be ascertained.

ST: I don't remember, but if you say it, that's it.
HF: (UI) Okay?
ST: Okay.
HF: And we'll make up, between now... It'll take us two weeks, part next week, part the week after.
ST: Okay.
HF: Okay (UI).
ST: I gotta have it before Christmas.
HF: Oh, it's gonna –
HB: (UI)
HF: I thought I was gonna get it –
ST: Yeah.
HF: I thought I had it today –
HB: Yeah. Okay.
ST: Okay. Fine.
HF: Okay.
HB: Steve –
HF: Oh, by the way –
HB: Did you have this place (UI)?
ST: Ten times –
HF: You can't –
ST: That don't mean a fuckin' thing, counselor.
HF: Hey, let me clear up one thing –
ST: That's how you talk. That's all, or if it gets too touchy, just write it.

3d Cir. Appx. 248-50a. Toward the end of the conversation, Traitz appears to link payment of the kickback with the possibility of the firm's receiving an increase in the contribution rate to the plan in the next collective bargaining agreement negotiated. *Id.* 281.1a-281.2a. The prosecutor argued to the jury that much of the conversation is in a hushed and guarded tone of voice.

During a December 3 telephone conversation between Traitz and Fisher, about a week later, Traitz also made statements from which the jury might reasonably have been persuaded that Traitz was suggesting a connection between Fisher's fulfillment of the kickback arrangement, on the one hand, and

the law firm's being retained as service provider under the Plan and Traitz's promise to try to negotiate a higher rate of contribution to the plan from which the trustees might then have agreed to pay a higher rate per month per member to the firm, on the other, and that Fisher did not demur. See *id.* 283-84a.

The defense presented numerous character witnesses, as well as evidence of the Traitz circle's use of violence and intimidation to extort money from those they dealt with in business.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals' Decision Upholding the Validity of the October Bugging Extension "Order" Reduces the Role of the Issuing Judge to a Sham, in Violation of Title III and the Fourth Amendment and in Disregard of All of this Court's Relevant Cases.

These petitioners were convicted almost entirely on the basis of a conversation recorded pursuant to a Title III electronic surveillance "Order" that the issuing judge never read before signing. The October 24, 1985, electronic bugging extension "order" consisted of pages 1, 2, 4, 5, 6 and 7, without a page 3. (The "Order" is reprinted as Appendix G(1) to this Petition.) As a result of the discontinuity between pages 2 and 4, the "order" could not be read as a logical whole. It also lacked any decretal "it is ordered that" language. Given the omission from the document of any language ordering or authorizing anything, what was signed by Judge Giles in October, although captioned an order, can only be labelled that way in quotation marks. In addition, because it had no page 3, the "order" also lacked two of the four standard conclusory findings under Title III and any direct statement of who was to conduct the surveillance or who in the Justice Department had authorized it. The lower courts' conclusion that this "order" was not "insufficient on its face" and failure even to consider whether an electronic surveillance "order" issued under such circumstances satisfies the Fourth Amendment's Warrant Clause cries out for this Court's review.

Apparently, neither the Assistant U.S. Attorney who presented the proposed order to the court, nor the district judge who signed it, nor any of the six or more FBI agents who conducted the surveillance under it noticed this omission. Yet without page 3, the "Order" was plainly a defective document. The only plausible explanation for the situation is that no one in the process was concerned enough about the Constitutionally protected privacy interests of those affected by the bugging, nor about the statutory and Constitutional requirements that electronic eavesdropping be conducted only in strict compliance with a court order, to actually read what the document said before affixing the signature of a Judge on behalf of the Court or engaging in the surveillance for which authority had been sought. (The only alternative possibility is that one or more of these persons did notice the omission of page 3, but did not bother to take any corrective action. In that event, the same argument would seem to follow.)

As it turned out, not only had Judge Giles not noticed the "order" was missing a page when he initially signed it, he also supposedly reviewed it again "with great care" *ex parte* before holding Mr. Fisher in contempt during the grand jury investigation. 3d Cir. Appx. 82a, 87a. After the documents were finally disclosed to the defense, and the defect revealed, the judge twice admitted that he could have signed a proposed order with a missing page. 3d Cir. Supp. Appx. 5sa, 10sa. Nevertheless, the district court's opinion treated the October 24 "order" as if it were a document, regular on its face, that happened to omit some statutorily-mandated boilerplate. App. E(1), at A-22 to -24.

The appellate panel's memorandum in the court below at least acknowledges at the outset that this document "was missing a page" when it was signed by the district judge. App. B (Fisher Mem. Op.) at A-11. The panel then proceeds to approve the facial sufficiency of this blatantly defective "Order" by suggesting that "the defect is technical and no substantial rights are involved." *Id.* at A-11. (The Bloom memorandum opinion adopts the Fisher memorandum by reference on this issue. App. A (Bloom Mem. Op.) at A-2 n.1.) See also *In re*

Grand Jury Matter (Doe), 798 F.2d 91, 92-93 (3d Cir. 1986) (refusing disclosure of documents to defense, and then finding same "order" facially sufficient upon *in camera* review). Such a "rubber stamp" signature does not comport with the Congressional intent behind §§2516(1) and 2518(3) or (5), which require the action of a *judge* before electronic surveillance may occur, nor with the Fourth Amendment's Warrant Clause.

A document which demonstrates on its face that it has not been read by the judge whose signature appears on it suffers a defect that is fundamental, not technical. Compare *United States v. Giordano*, 416 U.S. 505 (1974) (evidence suppressed where preliminary approval given by unauthorized official), with *United States v. Chavez*, 416 U.S. 562 (1974) (suppression not required where application misidentified authorizing official, but both that person and the one who actually approved the surveillance were authorized to do so). Indeed, unlike the respondents in *Giordano*, the individuals whose private conversations are recorded under the circumstances of this case suffer a loss of rights which are Constitutionally protected, because a judge who signs a warrant without reading it does not actually function as a "magistrate" or "judge" at all. The panel's conclusion is thus grossly erroneous. The affirmance of these convictions in unpublished memoranda suggests that the Third Circuit considers its prior decision in *United States v. Traitz*, 871 F.2d 368, 376-80 (3d Cir.), *cert. denied*, 107 L.Ed.2d 44 (1989), to be settled precedent. Certiorari should thus be granted here to correct the equally egregious analysis in that opinion.

The *Traitz* opinion considers whether Title III, the federal wiretap act, requires to be made explicit in writing those matters which would presumably have been contained on page 3 had it existed. *Id.* at 376-78. This approach almost completely misses the point of what occurred in this case. There is no dispute that the October extension "order," on its face, did not contain any express authorization language, nor did it contain two of the four "findings" required by 18 U.S.C. §2518(5) to be made before electronic surveillance may be extended beyond an initial period of 30 days. (See Statutes Involved for relevant text of §§2518(3) and (5).) The reason this occurred, however, is not that the court drafted a technically deficient order (nor even that the Justice

Department did so) — without page 3 it is impossible to know whether the document would have been technically sufficient or not — but rather that the judge never read what he signed.

This case involves a "fundamental failure to satisfy [several] of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." *Giordano, supra*, 416 U.S. at 575. To sanction the resulting seizures is to reduce both Title III and the Fourth Amendment Warrant Clause that it implements to a meaningless "form of words." *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) (Holmes, J.), quoted, *inter alia*, in *James v. Illinois*, 493 U.S. ____, 110 S.Ct. 648, 651 (Jan. 10, 1990) (attributing phrase to later sources).

a. *The October "order" was insufficient under Title III.*

Had the district judge first considered the "order" he was signing, he would have had to realize that by his signature he was making the following nonsensical statement, which is what one encounters in making the transition from page 2 to page 4, if one actually reads the document:

> There is probable cause to believe that particular oral communications of Stephen Traitz, Jr., ... and others ... concerning the above offenses, will be obtained through the interception of said oral communications, authorization for which is herewith been applied. [sic] In particular, these oral communications will concern the identities of the victims of the alleged extortionate credit transactions, racketeering activity, prohibited gambling enterprises, amounts extorted, terms of the Assistant Attorney General, Criminal Division, United States Department of Justice, who has been specifically designated by the Attorney General of the United States to exercise the power conferred upon him by Section 2516, Title 18, United States Code do the following:
>
> ....

App. G(1), at A-37. The fundamental Constitutional issue presented by the rote signing of this blatantly defective document can be avoided by a conclusion that the document was "insufficient on its face" under 18 U.S.C. §2518(10)(a)(ii). See generally *United States v. Chavez, supra*, 416 U.S. at 573-74.

The "Order" in this case could be found insufficient simply for its omission when signed of a page needed to allow it to be read as a coherent whole. Likewise, the evidence could be suppressed under §2518(10)(a)(iii) because the "order," even if read by the agents as their warrant, could not have been followed as written. See *United States v. George*, 465 F.2d 772 (6th Cir. 1972) (convictions reversed where agents not provided with and did not read and follow court order). But the resulting omission of mandatory "findings" renders the document insufficient on a more conventional basis. The *Traitz* court concluded, "[b]ased on the language of the statute, ... that the judge's act of signing the Order is sufficient evidence that the judge made the findings required under §2518(3) of the statute." 871 F.2d at 377. This conclusion is insupportable for two reasons, each inadequately addressed in the opinion. First, the subsection at issue here is not worded the same: subsection (3) only requires the judge to "determine" that the four conditions are satisfied; subsection (5), which applies to extension orders, expressly requires that the judge "mak[e] findings." The Third Circuit saw:

> no reason to believe, absent a showing of congressional intent to the contrary, that Congress, by using the word 'findings' rather than 'determinations' meant that extension orders must contain written findings by the judge where such written determinations are not required for the initial order.

Id. at 376 n.2. In such a carefully drafted statute, a difference in phrasing must be taken to imply a difference in meaning; it puts the usual rule backwards to assume that two different phrases mean the same thing. The court of appeals does not suggest what Congress meant in §2518(5) by requiring "findings" if the difference in meaning between §2518(3) and §2518(5) suggested by the petitioners is not correct. The petitioners' construction

has the virtue of imposing a stricter requirement whenever the more substantial intrusion of extended surveillance is to occur.

It may conceivably be, where none of the four required findings expressly appears in the order, that an inference they were made from the mere existence of a judicial signature would be appropriate. But the lower court misses the significance of the fact that here two of the required findings do appear in the pages of the October "order." 871 F.2d at 377 n.4. What this showing accomplishes is to disprove conclusively the hypothesis that the issuing judge in this case might have actually made the findings required by the law, but have intended to evidence them through the implications of a signature rather than by expressing them in an Order. The only fair reading of the actual document is that the issuing judge intended to express in writing in the order itself such findings as he made. And in fact, it is apparent that the judge who signed the extension "order" in October never *read* that document, in any meaningful sense, to determine whether it expressed the *judgment* of a *court* at all, as required by §2516(1) and §2518(3,5).

In effect, the *Traitz* rule would substitute presumptions of regularity and correctness – apparently irrebuttable – for any inquiry into whether the statute was respected and obeyed, because the actual facts of the situation show that it was not. Compare *United States v. Ojeda Rios*, No. 89-61 (decided April 30, 1990) (requiring careful compliance with provisions of Title III that implement its core concerns and remanding for consideration of excusing noncompliance [under statutory language not applicable here] only if reason given is both objectively reasonable and actually real). Given the existence, in writing on page 2 of the October "order," of findings "(a)" and "(b)" (under §2518(3), as incorporated into *id.*(5)), this is hardly a case in which to establish a presumptive rule (never before recognized in any circuit, or, indeed, in the holding of any court) that the issuing judge may be deemed to have made the required findings without reciting them. *United States v. Martinez*, 588 F.2d 1227 (9th Cir. 1978), to which the *Traitz* panel referred, 871 F.2d at 377, is not on point. That case holds that underlying findings of fact are not required; it does not excuse the court

from evidencing with simple conclusory written statements the four ultimate "findings" that the statute requires.

Nor is this a case where, for lack of contrary proof, a general presumption of regularity may fairly be invoked. Here, direct and conceded proof of a serious facial irregularity was offered. Where there is irregularity actually demonstrated on the face of the procedures followed, no presumption of regularity can arise. See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971); *United States v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926). That the judge approved an order, which he could not have read with any care (if at all) before signing – given that an internal page was missing and the text therefore did not connect logically – more than amply destroys any resort to presumptions or inferences of proper compliance.

This case is factually more like *United States v. Lamonge*, 458 F.2d 197 (6th Cir. 1972) (per curiam), but the approach taken and result reached by the Third Circuit below conflicts sharply with the Sixth Circuit's there. In *Lamonge* the judge signed but did not date two Title III orders. The court ruled that "the wiretap authorizations were on their face invalid at the time they were used. The evidence obtained through their use was inadmissible," *id.* at 199, even though these dates were inferable from other parts of the file, and dates of issuance were later ordered to be added *nunc pro tunc*. This Court should grant certiorari to endorse the Sixth Circuit's approach, and reject the Third's, in cases where the court fails to fulfill a true judicial function in its review and approval of Title III orders.

b. *The lower courts' construction of Title III violates the Fourth Amendment.*

This Court should also grant certiorari because the lower courts' interpretation of Title III in this context disregards all of this Court's precedents on the relationship between electronic surveillance orders and Fourth Amendment Warrant Clause jurisprudence. The memorandum points out that "the supporting documents were read and ... contained all of the limiting information set forth in the order ...." App. B, at A-11. This follows the lead of the *Traitz* opinion, which states, "In examining whether the judge properly performed his function it is not

the order which must be examined but rather the application and the affidavit which were submitted in support of the interception order." 871 F.2d at 378. This statement is directly contrary to the plain language of §2518(10)(a)(ii), which requires suppression for the facial insufficiency of the "order." Nor does either the memorandum below or the *Traitz* opinion consider the constitutional implications of this view, which wrongly exempts the warrant itself from scrutiny.

The Fourth Amendment demands more than just consideration of whether the prosecutor and/or investigating agents have made a sufficient showing of probable cause. It requires that the executive authorities secure a *judge's* considered agreement before acting and must abide by the *judge's* determination of the limitations on the scope of the intrusion as well. *In re Lafayette Academy, Inc.*, 610 F.2d 1, 4-5 (1st Cir. 1979). In denying this separate and critical Constitutional requirement, the Traitz opinion, followed in these cases, endorses a fundamentally erroneous understanding of the judicial function in the Fourth Amendment warrant-issuing process, as embodied in Title III for electronic surveillance orders and extensions.

The lower court's approach is not that of the Congress which adopted the electronic surveillance provisions of the 1968 crime control act. Title III is an elaborate statutory scheme developed in the wake of the Supreme Court decisions in *Berger v. New York*, 388 U.S. 41 (1967), and *Katz v. United States*, 389 U.S. 347 (1967), to save the techniques of wiretapping and bugging from the serious contention that they could not be conducted in accordance with the Fourth Amendment. One essential safeguard is the interposition of a judge, acting as a warrant-issuing magistrate, between the well-meaning (or overzealous) prosecutor and/or investigative agent and the private individual.

The notion that fundamental defects in the warrant or order may be overlooked, because the application is more important (or is the only important thing), places reliance on the prosecutor rather than on a judge to enforce the Fourth Amendment. This approach was emphatically rejected in *Coolidge v. New Hampshire*, 403 U.S. 443, 449-50 (1971). It defies the entire

philosophical basis of the Fourth Amendment, as interpreted in *Katz* and *Berger*, which gave rise to Title III. Indeed, in *Berger*, another case in which a "bug" planted in an office uncovered evidence of the bribery of local officials, this Court refused even to examine the application that had been submitted, because the *order* issued there, in compliance with the New York wiretap statute, did not sufficiently narrow the permissible scope and duration of the surveillance.

In the absence of an applicable warrant-clause exception, electronic surveillance is illegal where the application has not been approved after receiving "detached scrutiny by a neutral magistrate." *Katz*, 389 U.S. at 356. Moreover, the agents conducting the surveillance must "during the conduct of the search itself, ... observe precise limits established in advance by a specific court order." *Id.* This they can hardly do if the "order" they are to follow does not, on its face, contain any decretal, authorizing language, and, indeed, is not even logically readable from beginning to end. The mere existence of a document which the officer believes to authorize the bugging is not enough to save him from an accusation of violating the Fourth Amendment:

> [O]urs is not an ideal system, and it is possible that a magistrate ... will fail to perform as a magistrate should. We find it reasonable to require the officer applying for [or executing] the warrant to minimize this danger by exercising reasonable professional judgment.

Malley v. Briggs, 475 U.S. 335, 89 L.Ed.2d 271, 281 (1986).

A Title III order is a warrant for Fourth Amendment purposes. The signing of an "order" or warrant by a judicial officer does not, in and of itself, demonstrate that the application has received the required "detached scrutiny." A judge who believes the primary responsibility to protect the citizen's privacy lies not with himself but with the prosecutor is neither "detached" nor "neutral." And the judge who signs a proposed "order" that omits a critical, numbered page cannot be said to have given the matter "scrutiny" at all.

> [T]he courts must insist that the magistrate purport to 'perform his "neutral and detached" function and not serve merely as a rubber stamp for the police.' Aguilar v. Texas, [378 U.S. 108], 111 [(1964)]. ... A magistrate failing to 'manifest that neutrality and detachment demanded of a judicial officer when presented with a warrant application' and who acts instead as 'an adjunct law enforcement officer' cannot provide valid authorization of an otherwise unconstitutional search. Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 326-327 (1979).

United States v. Leon, 468 U.S. 897, 914 (1984). This standard applies not only to review of the application but also to the order itself:

> [I]ntercept orders under Title III ..., like other warrants, must be subjected to a review which will 'ensure that the issuing magistrate properly performed his function and did not "serve merely as a rubber stamp for the police." ' *United States v. Kalustian*, 529 F.2d 585, 589 (9th Cir. 1976), quoting *United States v. Ventresca*, ... 380 U.S. [102,] 109 [(1965)].

United States v. Ford, 553 F.2d 146, 165-66 (D.C.Cir. 1977).

A warrant that the issuing judge has never read, and that the executing agents could never have read either (despite their contrary "certifications"), is a general warrant in the purest sense and fundamentally repugnant to the Constitution.

> Over two centuries ago, Lord Mansfield held that common-law principles prohibited [general] warrants .... 'It is not fit,' said Mansfield, 'that the receiving or judging of the information should be left to the discretion of the officer. The magistrate ought to judge; *and should give certain directions to the officer.*' Leach v. Three of the King's Messengers, 19 How. St. Tr. 1001, 1027 (1765).

United States v. United States District Court, 407 U.S. 297, 316 (1972) (emphasis added). See also *Marcus v. Search Warrant*, 367 U.S. 717 (1961) (recounting history of Fourth Amendment in relation to abuse of general warrants).

The ABA Standards for Criminal Justice caution that a trial judge "called upon to issue a warrant ... should ... not permit these procedures to become mechanical or perfunctory." I ABA Standards, *Special Functions of the Trial Judge* ¶6-1.8, at 6-22 (2d ed. 1980). As the commentary to this standard urges:

> By ... insisting on compliance with known legal requirements, the judge is an exemplar for others involved in the process. Laxity in these matters invites abuse of civil rights and often taints the prosecution's case against an accused.

Id. at 6-23. That warning went unheeded in this case. The result was a complete breakdown in the legal process surrounding the issuance of orders for electronic surveillance, a reduction of what should be a serious and careful protection of constitutional rights to a mechanical charade. This Court should grant certiorari to consider and reject the analysis of the court below, following that of the *Traitz* opinion, which upholds such an embarrassing result.

2. The Court Should also Grant Certiorari Because the Panel Decision Upholds a Felony Conviction Without Reference to or Support in any Doctrine of Criminal Liability and Contrary to the Relevant Decisions of this Court.

Petitioner Herman Bloom was acquitted at trial of the RICO and RICO conspiracy charges, and of aiding and abetting embezzlement. He was convicted only on one count (Count 3) of giving, offering or promising a kickback to influence the actions and decisions of certain trustees and officers of the Roofers Union prepaid legal services plan, in violation of 18 U.S.C. §1954. The evidence showed that one of Bloom's law partners, petitioner Fisher, paid Stephen Traitz, Jr., and his Roofers Union colleagues a kickback of over $15,000 in three installments in December 1985. From the November 21 tape, the jury could have further concluded that Fisher promised Traitz, in Bloom's presence, to fulfill some sort of prior commitment to pay a total amount over the year equal to 10% of the firm's fees from serving the Fund.

The court below sustained petitioner Bloom's conviction for Fisher's conduct without reference to any legal principle, statutory language, or jury instruction, and without citing or distinguishing any of this Court's cases on vicarious criminal liability. Instead, the lower court affirmed this felony conviction of a lawyer with over thirty years in practice merely by suggesting that "the jury properly could have determined that Fisher and Bloom acted in concert and that the recorded payments made [by Fisher] on December 3 and 17, 1985, were made on behalf of both defendants." App. A (Bloom Mem.) at A-6. This kind of agency theory can, in criminal law, only be invoked under the doctrine of *Pinkerton v. United States*, 328 U.S. 640 (1946) (defendant liable for foreseeable crimes of coconspirator in furtherance of shared object of conspiracy). But this Court has insisted that such a theory of liability for substantive offenses can only be employed on appeal if it was included in the jury instructions. *Nye & Nissen Corp. v. United States*, 336 U.S. 613, 618 (1949). Here it was not. Moreover, the jury acquitted both petitioners of the only conspiracy charged: conspiring to violate RICO by engaging in a pattern of kickbacks and embezzlement.

To be sure, the evidence was sufficient — although not overwhelming or even unambiguous — to show that petitioner Bloom had knowledge of Fisher's arrangement with Traitz to pay a kickback. (See Statement of Facts, above, for transcript of the key passage from the November 21 tape.) But petitioner Bloom's mere presence at a discussion, even coupled with guilty knowledge, is not the §1954 prohibited act of giving or offering, nor is it a promise to give or offer a kickback. The government presented no evidence of where the money came from to make the payments; there was none that Bloom contributed anything. The attorney for the Legal Services Fund, a big firm labor lawyer, testified that Bloom had no management role with the Fund; the evidence he had done anything other than represent Roofers in court was minimal.

The evidence did not show that petitioner Bloom ever committed the offense of paying or promising a kickback. In the absence of a *Pinkerton* instruction, vicarious criminal liability

can be sustained only under 18 U.S.C. §2, either subsection (a), aiding and abetting, or subsection (b), which deals with one person's causing another to commit an offense on the former's behalf. The jury was charged that it could convict petitioner Bloom on Count 3 only under the terms of §2(a). 3d Cir. Appx. 349-50a. (The jury received no instruction under §2(b), so that theory need not be considered here.) As the trial judge instructed, however, it is not enough under §2(a) that the defendant may have "acted in concert" with another or that the other person may have committed a crime "on [his] behalf." To prove guilt on a theory of aiding and abetting:

> the Government must show that the defendant willfully and knowingly associated himself in some way *by his actions* with the crime and sought *by some action of his* to help make the crime succeed. Mere presence where a crime is being committed[,] even coupled with knowledge that a crime is being committed[,] or mere acquiescence without more[,] is not sufficient to establish aiding and abetting.

3d Cir. Appx. 350a (emphasis added). This correctly stated the law under *Nye & Nissen, supra,* 336 U.S. at 619. No such action was shown here. There was therefore no aiding and abetting.

While the evidence might at most have made out a case of conspiracy to pay a kickback, which was not charged, it did not show participation by petitioner Bloom in the prohibited act, nor the knowing and intentional personal action necessary for aiding and abetting. At most, the evidence in this case showed presence and guilty knowledge. In the absence of a *Pinkerton* instruction, this is legally insufficient. Certiorari should be granted to clarify the distinction between liability for conspiracy and aiding and abetting, and on that basis petitioner Bloom's conviction must be reversed and remanded for entry of a judgment of acquittal.

CONCLUSION

For each of the foregoing reasons, petitioners HERMAN BLOOM and HERBERT K. FISHER pray that this Court grant their petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Third Circuit affirming their convictions. The opinion below renders meaningless the governing language of Title III and attempts to substitute presumptions for reality. Most seriously, it construes the statute so that it would be unconstitutional if applied in that way. After review, the Court should remand for entry of an acquittal as to Bloom on Count 3. Barring that relief, and as to petitioner Fisher in any event, this Court should reverse the convictions and direct suppression of the fruits of the October electronic surveillance extension "order," because the panel memorandum, following the Third Circuit's *Traitz* opinion, condones and sanctions a scandalous failure to exercise the judicial function in the approval of electronic surveillance.

Respectfully submitted,

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June 11, 1990.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-1621

UNITED STATES OF AMERICA
vs.
BLOOM, HERMAN

Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Cr. No. 86-00451-19)
District Judge: Hon. Marvin Katz

Submitted Under Third Circuit Rule 12(6)
February 1, 1990
Before: STAPLETON and MANSMANN, *Circuit Judges*,
and ACKERMAN, *District Judge*.*

(Filed Feb. 8, 1990)

MEMORANDUM OPINION OF THE COURT

MANSMANN, *Circuit Judge*.

In this criminal matter, we address Herman Bloom's assertion that his conviction must be reversed due to fatal defects in the grand jury proceedings. We also examine Bloom's argument that there was insufficient evidence to support a conviction under 18 U.S.C. § 1954 and that the trial court committed plain

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* Honorable Harold A. Ackerman of the United States District Court for the District of New Jersey, sitting by designation.

error in instructing the jury. Because we find no reversible error, we will affirm the order of the district court.[1]

I.

On October 23, 1986, Herman Bloom, a partner in the law firm of Bloom, Ocks and Fisher, was indicted with eighteen others for violations of the RICO statute, conspiracy to violate RICO, embezzlement from a union welfare benefit plan and payment of kickbacks to influence the operation of an employee welfare benefit plan, in violation of 18 U.S.C. §§ 1962(e), 1962(d), 664 and 1954.

On May 14, 1987, Bloom's case and that of his co-defendant, Herbert Fisher, were severed for trial. In June, a superseding indictment was returned by the same grand jury. Bloom and Fisher alleged prosecutorial misconduct in the securing of both the original and superseding indictments. In an effort to cure any possible prejudice to the defendants as a result of proceedings before the first grand jury, the government sought a second superseding indictment from a new grand jury in January, 1988. This indictment was also challenged. Bloom's and Fisher's motions to dismiss the indictments were denied, *U.S. v. Fisher*, 692 F.Supp 495 (E.D. Pa 1988), and an interlocutory appeal from that denial was dismissed for lack of jurisdiction. *U.S. v. Fisher*, 871 F.2d 444 (3d Cir. 1989).

The case proceeded to trial with the case against Bloom growing out of his firm's connection with a welfare benefit plan ("the plan") operated on behalf of Roofers Union Locals 30/30B. Bloom's firm was retained as the sole provider of legal services to eligible members of the plan. The firm received payment

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1. In addition to the specific assignments of error addressed in this opinion, Bloom, in a one sentence section in his brief, adopts three arguments raised on appeal by co-defendant Fisher (No. 89-1604). These alleged errors include the introduction of evidence of bribery of public officials, the sufficiency on its face of the electronic surveillance order authorizing interception of conversations involving Bloom, and the denial of an evidentiary hearing to determine whether the monitoring agents read and complied with the surveillance order. We have examined these errors and find no ground for reversal. *See U.S. v. Fisher*, No. 1604 Slip Op. (3d Cir. February 1, 1990).

from the plan which was funded through a collective bargaining agreement between the union and an association of roofing contractors. In essence, Bloom was accused of involvement in an alleged ten percent kickback made by the law firm to the plan for the purpose of bribing government officials.

Bloom was charged with RICO and RICO conspiracy, with giving or offering a kickback to union officials and trustees of the plan and with aiding and abetting the embezzlement of that sum from the fund by some of its trustees. The evidence against him consisted of tapes of conversations taking place among Bloom, Fisher and Stephen Traitz, Jr., a union official and a trustee of the plan.[2]

Following trial, the jury acquitted Bloom on all charges except that involving the 1985 giving of a kickback to union officials in violation of 18 U.S.C. § 1954. Motions for new trial or judgment of acquittal were denied.

Bloom challenges his conviction on three grounds. First, he claims that the first two indictments returned against him were fundamentally flawed and should have been dismissed with prejudice. He also alleges fatal irregularities in the second superseding indictment and contends that it, too, should have been dismissed. Next, Bloom contends that the evidence against him was insufficient to support a conviction under 18 U.C.S. § 1954. He also argues that the trial court committed plain error in instructing the jury. We address these assignments of error in turn.

II.

Bloom's primary claim of error stems from the grand jury proceedings resulting in the indictments against him. Bloom claims that before both indicting grand juries, the government engaged in a pattern of conduct which had the net effect of

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2. Other conversations also recorded by the FBI pursuant to court order resulted in the conviction of union officials for offenses including racketeering, mail fraud, solicitation of kickbacks, embezzlement, bribery, extortion, and loan-sharking.

misleading the grand jurors as to the nature of the evidence, the nature of the charges, or both, upon which they were being asked to vote.

The specific allegations of prosecutorial misconduct are set forth in detail in the district court opinion, *U.S. v. Fisher*, 692 F. Supp. 495 (E.D. Pa. 1988) and we need not reiterate them there. We have reviewed these regulations of misconduct and the district court's conclusion that:

> What transpired before the first two grand juries was not perjury but rather negligence or inadvertence on the part of the prosecution and the agents resulting mostly from the press of events and from lapses of memory . . . Though the negligence and inadvertent errors made by the government before the first grand jury . . . reflect less than perfect behavior they do not rise to the level of prosecutorial misconduct warranting dismissal of an indictment.

Id. at 505.

Having reviewed the record, we do not find the district court's findings to be clearly erroneous.

Having so found, we do not dwell on these two indictments but turn instead to the second superseding indictment in order to determine whether it was tainted by the negligence occurring before the first grand jury or whether the second grand jury proceedings were defective in and of themselves. If we find that either is the case, we must examine whether Bloom is, as a result, entitled to dismissal of the charge upon which he was convicted. "[W]here the grand jury abuse charged involves claimed violations of a defendant's right to fundamental fairness . . . such issues, available for exploration at trial, survive the final judgment and are reviewable on appeal from a final judgment of *conviction*." *U.S. v. Fisher*, *supra* at 448 (emphasis supplied).

"The instant record discloses nothing that would call into question the validity on its face of the third indictment." *Id.* (emphasis omitted). We thus look behind the indictment to Bloom's contention that the indictment resulted from government harassment and is defective in that the prosecutor misled the jury and engaged in fundamentally unfair tactics. Because

Bloom was convicted only of a kickback offense, we confine our inquiry to alleged misrepresentations and misconduct involving this offense.

Bloom contends that it was misconduct for the prosecutor to argue to the grand jury that Bloom had been involved in illegal kickbacks in prior years when Bloom was charged only with crimes in 1985. The district court found, and we agree, that "[G]iven the ambiguity of possible interpretation this settlement did not constitute perjury." *Id.* at 503. Furthermore, Bloom was not convicted of involvement in illegal kickbacks for any year other than 1985.

Examining proceedings before the second grand jury as a whole, we find no misstatement of the law and no deliberate attempt to mislead the jury. In the overall, we agree with the district court's evaluation of the presentation to the second grand jury and find that its conclusions are amply supported. We conclude, therefore, that any defect in the first two indictments was cured by the government's presentation to the second grand jury.

III.

Bloom next asserts that the evidence adduced at trial was insufficient to sustain a conviction on Count 3 which charged the direct or indirect giving or offering or promise to give or offer a kickback in 1985. In reviewing a claim of insufficiency of the evidence after a guilty verdict, we must view the evidence and the inferences logically deducible therefrom in the light most favorable to the government in order to determine whether there is evidence sufficient to support the fact finder's verdict. *See United States v. Clapps*, 732 F.2d 1148, 1150 (3d Cir.), *cert. denied*, 444 U.S. 1085 (1984). Only when the record contains no evidence from which the jury could find guilt beyond a reasonable doubt will we overturn a verdict. *See United States v. McNeill*, 887 F.2d 448, 450 (3d Cir. 1989). "Inferences from established facts are accepted methods of proof when no direct evidence is available so long as there exists a logical and

convincing connection between the facts established and the conclusion inferred." *Id.*

When the November 21, 1985 conversation among Bloom, Fisher and Stephen Traitz, Jr., of the Roofers Union, is placed in the context of prior conversations, it is clear that the main purpose of the meeting was to discuss payment of the kickback. Fisher's use of the words "we" and "us" support the conclusion that Fisher spoke on behalf of Bloom when he acknowledged having paid money to Traitz previously during the year and promised to continue the payments. Bloom asked Traitz whether he had had his office checked for electronic surveillance devices. The record supports the inference that Bloom had made two previous efforts to discuss the kickback and, at the end of the conversation , Traitz again requested the kickback money.

The government argues that from this conversation the jury properly could have determined that Fisher and Bloom acted in concert and that the recorded payments made on December 3 and 17, 1985 were made on behalf of both defendants. We agree. Accordingly, we find no reversible error here.

IV.

Finally, Bloom contends that the trial court committed plain error in instructing the jury regarding the elements of the kickback charge on Count 3 of the second superseding indictment. The district court instructed the jury that the government had met its burden if it were able to show that "the defendant . . . gave or offered or promised to give or offer Stephen Traitz, Jr., the kickback in the form of ten percent of the legal fees paid to the firm . . . *or other funds* tending to influence Traitz. . . ." (Emphasis supplied.) Bloom raised no objection at the time but now Bloom argues that the district court improperly altered or amended the indictment by using the words "or other funds" to identify the source of the money paid to Traitz.

The government contends and we find that neither the statute not the indictment requires the government to prove the specific source of the money supplied. The court correctly advised the jury that a kickback to influence the operation of the

prepaid legal fund was actionable; the specific source of the kickback money was irrelevant.

We find no plain error in the trial judge's instruction.

V.

Having found no reversible error on any of the grounds set forth by the defendant, we will affirm the order of the district court.

TO THE CLERK:

Please file the foregoing opinion.

/s/ CAROL LOS MANSMANN
Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-1604

UNITED STATES OF AMERICA

vs.

FISHER, HERBERT K.,

Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Cr. No. 86-00451-18)
District Judge: Hon. Marvin Katz

Submitted Under Third Circuit Rule 12(6)
February 1, 1990
Before: STAPLETON and MANSMANN, *Circuit Judges*,
and ACKERMAN, *District Judge**
(Filed Feb. 8, 1990)

MEMORANDUM OPINION OF THE COURT

MANSMANN, *Circuit Judge.*

In this criminal matter, we are asked to determine whether the defendant, Herbert Fisher, was denied a fair trial due to the admission of certain evidence. We are also asked to examine whether the district court erred in finding an electronic surveillance order sufficient "on its face" despite a missing page or in

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Honorable Harold A. Ackerman of the United States District Court for the District of New Jersey, sitting by designation.

denying an evidentiary hearing to determine whether the monitoring agents acted in conformity with the order. Because we conclude that it was not an abuse of discretion for the trial judge to admit the evidence in question and that there was no reversible error associated with the electronic surveillance order, we will affirm the order of the district court.[1]

I.

On October 23, 1986, Herbert Fisher, a partner in the law firm of Bloom, Ocks and Fisher, was indicted with eighteen others, for violations of the RICO statute, conspiracy to violate RICO, embezzlement from a union welfare benefit plan and payments of kickbacks to influence the operation of an employee welfare benefit plan, in violation of 18 U.S.C. §§1962(c), 1962(d), 664 and 1954.

On May 14, 1987, Fisher's case and the case of his codefendant Herman Bloom were severed for trial. In June, a superseding indictment was returned by the same grand jury. Bloom and Fisher alleged prosecutorial misconduct in the obtaining of the first and superseding indictment. In an effort to cure any possible prejudice resulting from the first two indictments, the government presented a second superseding indictment to a new grand jury. this indictment was returned on January 21, 1988.[2]

The charges set forth in the indictments stemmed from the law firm's connection with a welfare benefit paln operated on

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1. In addition to the errors addressed herein, Fisher set forth a one-sentence caption, without delineation or argument adopting arguments advanced on appeal by co-defendant Herman Bloom (No. 89-1621). Bloom contended that the indictments against him should have been dismissed due to prosecutorial misconduct and that the trial court erred in instructing the jury on the kickback charge. We have concluded that no reversal on these grounds is warranted. *See, U.S. v. Bloom*, No. 89-1621 Slip Op. (3d Cir. February 1, 1990).

2. Fisher and Bloom's motions to dismiss the indictments due to misconduct were denied by the district court, *U.S. v. Fisher*, 692 F.Supp. 495 (E.D. Pa. 1988), and an interlocutory appeal from that denial was dismissed for lack of jurisdiction. *U.S. v. Fisher*, 871 F.2d 444 (3d Cir. 1988).

behalf of Roofers Union Locals 30/30B. Fisher's firm was retained as the sole provider of legal services to eligible members of the plan. The plan was funded pursuant to a collective bargaining agreement between the Union and an association of roofing contractors. The firm's compensation was a fixed amount paid monthly by the plan based on a formula consisting of the number of eligible members and a rate per member which was negotiated among the trustees of the plan, outside consultants and the law firm. Fisher was alleged to have participated in a kickback of funds to the plan for use in bribing local officials.

The evidence against Fisher grew out of a court authorized surveillance order pursuant to which the FBI monitored telephone conversations in the office of a union official and plan trustee and in the business agents' meeting room at the union hall. Electronic surveillance commenced on September 26, 1985 and, pursuant to five count orders extending the surveillance for five successive 30-day periods, continued until February 20, 1986. This evidence led to the conviction of union officials for offenses including racketeering, mail fraud, solicitation of kickbacks, embezzlement, bribery, extortion, and loan-sharking.

At Fisher's trial, the government relied on tapes of 33 conversations in order to show that Fisher unlawfully gave union officials ten percent of the compensation paid to Bloom, Ocks and Fisher by the plan in 1983, 1984 and 1985. The payments were alleged to have been illegal kickbacks paid in order to retain or increase the plan's business with the firm in violation of 18 U.S.C. §1954. The payments were also alleged to have aided and abetted the union officials in embezzlement of the plan in violation of 18 U.S.C. §§664 and 2. The kickbacks and embezzlements, in turn, were alleged to be racketeering acts, forming the basis for charging Fisher and Bloom with violating and conspiring to violate RICO, 18 U.C.S. §1692(c) and (d).

Following deliberation, the jury returned a verdict acquitting Fisher of all charges except those contained in Count Three, making unlawful kickbacks in 1985. Motions for a judgment of acquittal pursuant to Fed.R.Cr.P. 29(c) and for a new trial pursuant to Fed.R.Cr.P. 33 were denied.

Fisher here challenges his conviction on two grounds. First, he argues that the surveillance order was defective and that he was improperly denied an evidentiary hearing regarding the order. Fisher also assigns as error the admission of evidence regarding bribery of public officials. We address alleged defects in the surveillance order first.

II.

Fisher contends that certain evidence obtained through electronic surveillance should have been suppressed in that the surveillance order of October 24, 1985, which authorized a 30-day extension of electronic monitoring, was missing a page.[3] We examined the facial sufficiency of this order in *U.S. v. Traitz*, 871 F.2d 368 (3d Cir. 1989).

Fisher seeks to avoid our finding that the order was facially sufficient by contending that in *Traitz* we did not address the order *in se* but looked beyond the order to supporting documentation. He contends that a court may not look beyond the order in ruling on questions of facial sufficiency. In our view, *Traitz* is dispositive of the issues raised here. There we wrote:

> In determining whether there was substantial compliance with the statute we may look beyond the face of the order to the facts as they actually existed in order to determine if there was compliance with the substantive requirements of the statute. *U.S. v. Acon*, 513 F.2d 513, 518 (3d Cir. 1975).

Traitz 871 F.2dat 379. In *U.S. v. Acon, supra*, we held that suppression for facial insufficiency under 18 U.S.C. §2518(10)(a)(ii) is not required where the defect is technical and no substantial rights are involved. Here, where the supporting documents were read and where they contained all of the limiting information set forth in the order, there was no substantial right impaired by the missing page and thus was no facial insufficiency mandating suppression.

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3. The priminary evidence against Fisher was a recording of a meeting which took place during this thirty-day extension period.

III.

Fisher continues to focus on the missing page of the surveillance order in contending that he should have been accorded an evidentiary hearing in order to examine the monitoring agents regarding the order. Fisher argues that he was improperly denied the opportunity to question the agents in order to establish that the intercepted communications should have been suppressed under §2518(10(a)(iii) because the interception was "not made in conformity with the order of authorization" or under §2518(10)(a)(i) because "unlawfully intercepted." Fisher contends that the monitoring agents either did not read the October 24th order or, if they did, could not have fully complied with its command since the order lacked a substantial part of the decretal paragraph.

Fisher has made no showing that the missing page would have changed the course of the interceptions or that it prejudiced him in any way. There is nothing whatever in the record to show that the conversations intercepted should not have been recorded or that minimization was insufficient. The district court found that the order was an extension of a prior order complete and already acted upon, that the affidavit supporting the order contained detailed minimization instructions, that minimization conferences had been held, that memoranda containing minimization instructions were distributed and that appropriate minimization of non-pertinent conversations occurred. The monitoring agents read and initialled the affidavit supporting the order and the prosecutor testified that this initialling established that the agents had read the order too.

Fisher's argument is creative but unavailing. In the absence of even a hint of prejudice he was not entitled to the evidentiary hearing claimed.

IV.

Finally, Fisher contends that he was unfairly prejudiced by the introduction of extensive evidence relating to union officials' bribery of judges. He argues that the evidence introduced was only tangentially relevant to the charges against him and that

any relevance was "substantially outweighed by the danger of unfair prejudice." Fed. R. Evid. 403. According to Fisher, the trial court failed to engage in the balancing analysis required by Rule 403.

We note at the outset that rulings concerning the admission of evidence at trial are reviewable under the "abuse of discretion" standard. *In re Japanese Electronic Products*, 723 F.2d 238, 260 (3d Cir. 1983), *rev'd on other grounds, Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

The government has offered several theories supporting the relevance of the bribery evidence. First, the evidence was relevant to the plan, purpose and scope of the RICO conspiracy charged. Under the government's theory it was also relevant to prove essential elements of the embezzlement and kickback offenses. Finally, the government contends that the bribery evidence placed Fisher's actions and statements in a sequence of events. Fisher argues that the evidence of bribery was irrelevant to these theories and that even if relevant, it was not essential and was ultimately substantially prejudicial.

The trial judge denied Fisher's pre-trial motion to suppress the bribery evidence, ruling that the evidence was admissible as to the embezzlement charges and to allow the government to show fully the scope of the alleged scheme and to place Fisher's alleged offenses in context. At trial when objection to the bribery evidence was renewed, the court declined to restrict the government in its opening statement, remarking that it was necessary for him to "get a feel for the case" before considering exclusion further. The record reveals the court's continuing assessment of the government's theories, what was required to develop these theories, and a consideration of the tapes as they related to those theories. Under the circumstances, we cannot conclude that the trial judge failed to apply the Rule 403 balancing test in properly admitting the disputed evidence. Accordingly, we find no abuse of discretion.

V.

For the foregoing reasons, we find no reversible error and will affirm the order of the district court.

TO THE CLERK:

Please file the foregoing opinion.

/s/ CAROL LOS MANSMANN
Circuit Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-1621

UNITED STATES OF AMERICA

vs.

BLOOM, HERMAN

Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Cr. No. 86-00451-19)
District Judge: Hon. Marvin Katz

Before: STAPLETON and MANSMANN, *Circuit Judges*,
and ACKERMAN, *District Judge**

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted under Third Circuit Rule 12(6) on February 1, 1990.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the District Court entered on July 17, 1989 be and the same is hereby affirmed.

No costs taxed against appellant.

ATTEST:

/s/ SALLY MRVOS
Clerk

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*Honorable Harold A. Ackerman of the United States District Court for the District of New Jersey, sitting by designation.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-1604 and 89-1621

UNITED STATES

vs.

HERBERT FISHER,
Appellant in No. 89-1604

UNITED STATES

vs.

HERMAN BLOOM,
Appellant in No. 89-1621

(D.C. Criminal Nos. 86-00451-18 & 19)
SUR PETITION FOR REHEARING

Present: HIGGINBOTHAM, *Chief Judge*,
STAPLETON, MANSMANN, GREENBERG,
HUTCHINSON, COWEN, and NYGAARD, *Circuit Judges*,
and ACKERMAN, *District Judge**

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active

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*Judge Ackerman vote was limited to rehearing before the original panel.

service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ CAROL LOS MANSMANN
Circuit Judge

APPENDIX E(1)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER AUTHORIZING THE INTERCEPTION OF ORAL COMMUNICATIONS	:	Miscellaneous No. 85-2012

MEMORANDUM AND ORDER

GILES, J. June 25, 1987

I. THE SEPTEMBER 23, 1985, ORDER

On September 23, 1985, this court by order authorized electronic surveillance of oral communications for a period of thirty (30) days occurring at the Business Manager's Office and the Business Agent's Meeting Room of the Roofers' Union, Locals 30/30B, 6447 Torresdale Avenue, Philadelphia, pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2518. The authorization was in furtherance of an investigation by the Federal Bureau of Investigation (FBI) into possible violations of the Racketeer Influenced and Corrupt Organizations Act, (RICO) 18 U.S.C. §§1961-1968 (1976). At paragraph 5(a) of the sworn Affidavit of FBI Special Agent Quinn John Tamm, Jr., which was incorporated by reference in the Application of the United States Attorney for the Eastern District of Pennsylvania (¶A), it was stated that:

> 5. The facts and circumstances of this investigation as set forth below show that:
>
> (a) There is probable cause to believe that Stephen Traitz, Jr., Harry Joseph, Michael "Nails" Mangini, Robert Medina, James Nuzzi, Stephen Traitz, III and other [sic] as yet unknown, associated in fact as an enterprise as defined in section 1961(4), Title 18, United States Code have committed and are conspiring to commit offenses, in the conduct of

> said enterprises [sic] affairs, involving interstate transportation of stolen property, mail fraud, extortionate collections of credit, and an illegal gambling enterprise, (racketeering) in violation of Title 18, United States Code, sections 1962(c) and (d) 1963, 2314, 1341, 894 and 1955.

Based upon the information contained in the Application and incorporated Affidavit, the court concluded that the triggering requirements had been met for authorizing interception of oral communications pursuant to 18 U.S.C §2518 and directed that the surveillance be conducted in accordance with the statute. Specifically, the court found that

> a) There is probable cause to believe that Stephen Traitz, Jr., Harry Joseph, Michael "Nails" Mangini, James Nuzzi and Robert Medina and others yet unknown, have committed and are committing offenses prohibited and punishable under (1) section 1962(c) and (d) and 1963 of Title 18 United States Code (involving, conducting or participating in the conduct of the affairs of an enterprise that engages in, or the activities of which affect interstate commerce, through a pattern of racketeering activity and conspiracy in connection therewith) and (2) section 1955 of Title 18 United States Code, mainly prohibition of business enterprises of gambling and the conspiracy to do so, section 894 of Title 18, United States Code, namely collection of extensions of credit by extortionate means and the conspiracy to do [so], and section 2314 of Title 18, United States Code, namely the interstate transportation of stolen property and the conspiracy to do so.

Defendants have challenged this authorizing order as invalid on numerous grounds, chief among them, assertedly, the absence of probable cause, and seek suppression of evidence gathered through the initial interception, and all subsequent, similar orders, and fruits thereof, as the products of illegal search and seizure. The challenges are without merit for the reasons set out below.

A. Probable Cause

The wiretap application must show probable cause that (1) an individual has or is about to commit the particular enumerated offenses; (2) particular communications relating to the charged offense will be obtained through the interception; and (3) the premises where the interception will be made are being used in connection with the charged offense. *United States v. Armocida*, 515 F.2d 29, 35 (3d Cir.), *cert. denied*, 423 U.S. 858 (1975); 18 U.S.C. §2518(3)(a), (b) and (d).

In reviewing the sufficiency of the representations and evidence in the Application and Affidavit for "probable cause," the issuing court must determine whether under the totality-of-the-circumstances test the facts warranted the conclusion of probable cause. *See Illinois v. Gates*, 466 U.S. 213, 230-39 (1984); *Massachusetts v. Upton*, 466 U.S. 727, 732 (1984). In doing so, it must be remembered that only the probability standard, and not the *prima facie* showing or proof beyond a reasonable doubt standards, is applicable to probable cause. *Illinois v. Gates*, 462 U.S. at 230-39. A reviewing court is obligated to accord great deference to the initial finding and apply commonsense meanings to words in deciding whether there existed a substantial basis for probable cause. *Id.* at 236, 238-39. Here, the Government supplied a factual basis that dictated the conclusion of probable cause.

The operative factual assertions contained in the Tamm Affidavit are ascribed to two confidential informants whose reliability for accuracy of information was corroborated by the FBI through independent investigation and by their past history of providing reliable information. Their reliability was further reasonably established to the satisfaction of the court through the details of their accounts and their opportunities for personal observation. Their accounts connected the instances of probable violations of the referenced criminal statutes to the Roofers' Union and particularly to the rooms designated in the order for interception.

[Discussion of other issues omitted.]

VII. THE OCTOBER 24, 1985, ORDER

A. Facial Sufficiency of the October 24, 1985, Order

Defendants move to suppress the contents of the intercepted oral communication pursuant to 18 U.S.C. §2518(10)(a)-(ii), which permits such suppression when "the order of authorization or approval under which it was intercepted is insufficient on its face." The basis for defendants' motion is that page three of the October 24, 1985 Order is missing.

Before a Title III order may be entered, §2518(3) requires the judge to make a series of determinations based on the Government's application:

> Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the application that . . . .

18 U.S.C. §2518(3). Defendants contend that, absent page three, the October 24, 1985, order violated 8 U.S.C. §2518(3) which requires a judicial finding that

> (c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;
>
> (d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

28 U.S.C. §2518(3)(c), (d). In addition, defendants argue that the order fails to comply with 28 U.S.C. §2518(4)(d), which states that "[e]ach order authorizing or approving the interception of any wire or oral communication under this chapter shall specify

. . . the identity of the agency authorized to intercept the communications, and of the person authorizing the application."

On April 21, 1987, counsel and the court reviewed the original documents in this matter, filed under seal, which provided for the interception of oral communications. Page three was missing from the original document, and it is also missing from the copies of all defense counsel and of the Government. This court must assume for the purpose of ruling on the motion that the page was missing when the order was signed. Addressing first the contention that the lack of a written finding renders the October 24, 1985, Order facially insufficient, I find that the absence of a written recitation of the statutorily required conclusion does not mandate suppression.

18 U.S.C. §2518(c) does not require that the judicial determinations mandated by the statute be set out in writing or that the determination be expressed in words rather than by the act of the judge. *See, e.g., United States v. Martinez,* 588 F.2d 1227, 1233 (9th Cir. 1978) (judge not required to issue findings of fact to support wiretap order); *United States v. Tortorello,* 342 F. Supp. 1029, 1036 (S.D.N.Y. 1972) (section 2518(3)(c) does not require that particular words be used in the finding or that the finding be expressed in words rather than by the act of the judge), *aff'd,* 480 F.2d 764 (2d Cir.), *cert. denied,* 414 U.S. 866 (1973); *United States v. Mainello,* 345 F. Supp. 863, 874 (E.D.N.Y. 1972) (no specific statement of facts required in order and when the investigation involves a large scale conspiracy the difficulty of procuring reliable evidence through conventional investigative channels is self-evident); *United States v. Escandar,* 319 F. Supp. 295, 304 (S.D. Fla. 1970) (section 2518(3) does not mandate that judge's determination be reflected in the written order), *remanded sub nom., United States v. Robinson,* 472 F.2d 973 (5th Cir. 1973) (per curiam); J. Carr, The Law of Electronic Surveillance (2d ed. 1986). Further, Senate Report 1097 also does not indicate that written findings are required. S. Rep. No. 1097, 90th Cong., 2d Sess. 11 *reprinted in* 1968 U.S. Code Cong. & Admin. News 2153.

Thus, under the broadest view of 18 U.S.C. §2518(3), the signature of the issuing judge on the evidences that he or she has made the statutorily required determinations. Several considerations support that conclusion.

The judge's signature indicates that he or she has considered the application and the supporting affidavits for an interception order. Further, the October 24, 1985, Order states that the court has given "full consideration . . . to the matter set forth" in the application. Order of October 24, 1985, at 1. That Order also states that the application was made to the court under oath by the Assistant United States Attorney.

When the statute does not require a written finding, it is reasonable to infer from the act of the judge that he or she has made, at least, the minimal determinations required by 18 U.S.C. §2518(3). That inference is supported by the cases that hold that a minimal written finding by the issuing judge, even one that only parrots the conclusory language of the statute, satisfies §2518(3). *See, e.g., Martinez*, 588 F. 2d at 1233; *Tortorello*, 342 F. Supp. at 1036; *Mainello*, 345 F. Supp. at 874; *Escandar*, 319 F. Supp. at 304.

There is no practical difference between the minimal findings that have been found to comply with the statute and an absence of written findings. When the issuing judge makes written findings that set forth the statutorily required conclusion without reasons or reference to the application and affidavits, the court on review must examine the application and supporting materials to determine whether the decision of the issuing judge was proper. *See, e.g., Martinez*, 588 F. 2d at 1233. In *Martinez*, the issuing judge addressed 18 U.S.C. §2518 (3) (c) by merely concluding and repeating the statutory language. By finding that the conclusory order was based on full consideration of the information contained in the application and the supporting affidavit, the *Martinez* court held that written findings of fact in support of the order were unnecessary and that the "factual grounds upon which the judge issued the order can be inferred from the affidavit, and to require extra findings would not add to our ability to properly review his actions." *Id.*

Thus, a court reviewing the issuance of a Title III wiretap order must refer to the application regardless of whether there were written findings. Page one of the October 24, 1985, Order states that "[a]pplication under oath having been made before me by Richard L. Scheff, Assistant United States Attorney . . and full consideration having been given to the matter set forth therein . . . ." When the issuing judge has made no written determination, the signature of the judge on the order reflects the judge's consideration of the application and affidavit and embodies his or her conclusion that the application satisfies 18 U.S.C. §2518(3).

Further, the October 24, 1985, Order states that the application was made under oath by the Assistant United States Attorney before the issuing judge. Thus, the order incorporates the application and necessarily incorporates the affidavit of Special Agent Quinn John Tamm. That incorporation supports the proposition that, even absent a written finding, the reviewing court must consider the application and affidavit when examining the order for compliance with 18 U.S.C. §2518(3).

The structure of the statute also leads to that conclusion. Section 2518 sets out a detailed, mandatory procedure governing the interception of wire or oral communications. Within the scheme of the statute, §2518(1) is the primary restraint imposed by Congress to avoid undue intrusions upon privacy. Section 2518(1) sets a standard for the Government's written showing that the facts of the situation overcome the right to privacy.

In comparison, 18 U.S.C. §2518(3) commits to the discretion of the judge the authorization to issue the ex parte order, but the use of a judge as the decisionmaker is the sole protection of the right of privacy in §2518(3). As discussed, *supra* at 52-54, the issuing judge must determine that probable cause exists for factors set out in §§2518(3)(a)-(d), but the judge need not make those findings in writing. Further, each of those findings only reflect an evaluation of a requirement of the application set out in §2518(1).

Thus, 18 U.S.C. §2518(3) obligates the courts to balance the permissible use of electronic investigative devices against the mandatory Congressional restraints set out in the remaining

subsections of §2518: (1) (written requirements for the application); (4) (restrictions on the communications to be intercepted); (5) (restrictions on length of interception period and minimization of communications intercepted; (6) (progress reports justifying continued interception); (7) (provision for emergency interception without prior application); (8) (provisions regarding method of recording interceptions and sealing and preservation of applications, order and recordings made, under §2518); (9) (restrictions or use of interceptions as evidence in court proceedings prior to disclosure of order and application to parties to those proceedings); and (10) (procedure for suppression of intercepted communications). *Cf. United States v. Vento*, 533 F.2d at 849 (statement of purpose of Title III). 18 U.S.C. §§2511-2517 sets out further general restrictions on interceptions of wire or oral communications.

For the purpose of review of orders authorizing interception, the structure of the Act places the primary protection of the right to privacy on the 18 U.S.C. §2518(1) application. While the issuing judge is certainly the safeguard against any abuse of the rights of the public, the nature of an ex parte order guarantees that the ultimate judicial decision on the privacy issue must occur after interception. When that review relies on the requirements for the application set out in §2518(1), *see, e.g., Martinez*, 588 F.2d at 1233, it is reasonable to find that an order that was entered after consideration of an application and affidavit that conform to the provisions of §2518(1) meets the requirements of §2518(3) without a written finding. Defendant's assertions that the lack of a written finding renders the October 24, 1985, Order facially insufficient are without merit.

Further, the purpose of 18 U.S.C. §2518(3)(c) is to ensure that the "necessary requirement" of §2518(1)(c) is met. *Martinez*, 588 F.2d at 1231. Wiretaps are not to be used routinely or as the first step of an investigation when other, less intrusive investigatory techniques are viable. Necessity exists if the application and affidavit support a finding of probable cause that normal investigative procedures will not suffice. *Id.* at 1232. As discussed *infra* at 76-77, probable cause existed to support the belief that normal investigative procedures reasonably appear to

be unlikely to succeed if tried or to be too dangerous. Similarly, defendants' contention that the October 24, 1985, Order violates §2518(3)(d) fails, for the analysis demonstrates that probable cause existed for the belief that the facilities listed for interception are being used, or are about to be used, in connection with the listed offenses by the named interceptees.

The October 24, 1985, Order is not facially insufficient and suppression under 18 U.S.C. §2518(10)(a)(ii) is not required.

B. The October 24, 1985, Order Satisfies 18 U.S.C. §2518(4)

18 U.S.C. §2518(4)(a)-(e) provides

> (4) Each order authorizing or approving the interception of any wire or oral communication under this chapter shall specify –
>
> (a) the identity of the person, if known, whose communications are to be intercepted;
>
> (b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;
>
> (c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;
>
> (d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and
>
> (e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

Defendants contend that, absent page three, the October 24, 1985, Order fails to comply with §2518(4)(d).

Although not in the same sequence as 18 U.S.C. §2518(4), the October 24, 1985, Order sets out all the directives required by the statute. First, the Order identifies the Department of

Justice official authorizing the application. Page four of the Order identifies the "Assistant Attorney General, Criminal Division, United States Department of Justice, who was been specifically designated by the Attorney General of the United States to exercise the power conferred upon him by section 2516, Title 18, United States Code . . . ." 18 U.S.C. §2516 specifies the persons who may authorize interception of wire or oral communications. When read together, the title of the Assistant Attorney General, Criminal Division, and the reference to that official exercising the power conferred upon him by §2516 necessarily indicates that the Assistant Attorney General In Charge of the Criminal Division authorized the interception application. In fact, the Assistant Attorney General In Charge of the Criminal Division did authorize the application for the October 24, 1985, Order.

It is not significant that the Order mentions the title rather than the name of the authorizing official. *See United States v. Chavez*, 416 U.S. 562, 565, 579-80 (1974) (order incorrectly noted that the Assistant Attorney General approved the application when in fact it was approved by the Attorney General); *United States v. Lambert*, 771 F.2d 83, 90 (5th Cir.), *cert. denied*, 106 S. Ct. 598 (1985); *United States v. Camp*, 723 F.2d 741, 744 (9th Cir. 1984) (authorizing official can be designated by position rather than specific individual). Certainly, the reference to the name rather than the title of the authorizing official is not "a failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures." *United States v. Giordano*, 416 U.S. 505, 527 (1974), *quoted in United States v. Acon*, 513 F.2d 513, 517 (3d Cir. 1975). The purpose of 18 U.S.C. §2516 is to "centralize [ ] in a publicly responsible official subject to the political process the formulation of law enforcement policy on the use of electronic surveillance techniques." S. Rep. No. 1097, 90th Cong., 2d Sess. 96-97, *reprinted in* 1968 U.S. Code Cong. & Admin. News 2112, *quoted in United States v. Giordano*, 416 U.S. at 520. The reference in the

order to the title of the authorizing official fulfills the congressional intent of 18 U.S.C. §2516 to fix responsibility on the public official who authorized the wiretap.

Second, the Order identifies the agency authorized to intercept the communications as the Federal Bureau of Investigation. Page six of the Order states that "the Bell Telephone Company of Pennsylvania shall furnish the Federal Bureau of Investigation such information, facilities and technical assistance as are necessary to accomplish the oral interception . . ." Logic dictates that if the Order directs the Bell Telephone Company to assist the FBI with the interception, then the FBI is the agency authorized to intercept.

Suppression is not required as the October 24, 1985, Order complies with 18 U.S.C. §2518.

[Discussion of other issues omitted.]

XI. SUMMARY

As of January 22, 1986, through the interceptees and others affiliated with them, there was probable cause to believe that there were in place, and continuing, several concurrent, interwoven illegal schemes, each violative of one or more of the criminal statutes which formed the basis for the interceptions. This conduct, apparent from the interceptions to be probable violations of the law was being committed by knowing participants perpetuating the RICO criminal enterprise alleged by the Government. That enterprise abused powers granted to the Roofers Union under federal law and misappropriated trust funds committed to the Union's care and administration, to gain license, through the purchase of judicial and political influence, to intimidate and control persons through the use and threat of physical force and violence for the personal gain and advantage of the core participants. Those persons were reasonably shown by the interceptions, and information provided by CSN-1 and CSN-2, to be the interceptees authorized by the Orders.

APPENDIX E(2)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER AUTHORIZING THE INTERCEPTION OF ORAL COMMUNICATIONS	:	Miscellaneous No. 85-2012

ORDER

AND NOW, this 25th day of June, 1987, it is hereby ORDERED that defendants' motions to suppress are DENIED.

BY THE COURT:

/s/ JAMES T. GILES
J.

APPENDIX E(3)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER AUTHORIZING THE INTERCEPTION OF ORAL COMMUNICATIONS	:	Miscellaneous No. 85-2612

ORDER

AND NOW, this 25th day of June, 1987, it is hereby ORDERED that the Memorandum and Order dated June 25, 1987, in the above-captioned matter is filed under SEAL.

Filed June 25, 1987
Michael E. Kunz, Clerk
By /s/ JZ
Deputy Clerk

BY THE COURT:

/s/ JAMES T. GILES
J.

APPENDIX E(4)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER AUTHORIZING THE INTERCEPTION OF ORAL COMMUNICATIONS	:	Misc. No. 85-2012
UNITED STATES OF AMERICA	:	
v.	:	
	:	Crim. No. 88-215-01
HERBERT K. FISHER and HERMAN BLOOM, *Defendants.*	:	

ORDER AUTHORIZING UNSEALING AND LIMITED DISCLOSURE OF CERTAIN ELECTRONIC SURVEILLANCE MATTERS

Upon application of the above-named defendants, and the government having no opposition, IT IS ORDERED, pursuant to 18 U.S.C. §2518(8)(b), Local Criminal Rule 16(a) and Local Civil Rule 4(1), that the defendants above named may publish in the appendix to their petition for certiorari to be filed with the United States Supreme Court the text of this Court's October 24, 1985, electronic surveillance extension Order, with supporting affidavit, and page 1-4 (down to but not including heading "1" and following text), 49 (beginning at heading "VII") – 59 (down to but not including heading "C"), and 99 (beginning at heading "XI") of Judge Giles' Memorandum dated June 25, 1987, under the above Miscellaneous caption, together with

Judge Giles' related Orders of June 25, 1987. These documents are accordingly ordered UNSEALED to the extent stated in this Order.

BY THE COURT:

/s/ HERBERT J. HUTTON
Herbert J. Hutton, U.S.D.J.
Emergency Judge

Dated: June 7, 1990

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
HERBERT K. FISHER	:	
HERMAN BLOOM	:	NO. 86-00451-18, 19

[Published at 692 F.Supp. 488, 490, 495]

ORDER

AND NOW, this 29th day of June, 1988, after a hearing and upon consideration of defendants Herman Bloom and Herbert K. Fisher's Motion and Renewed Motion to Suppress Certain Tape Recorded Conversations and the government's response thereto, it is hereby ORDERED that defendants' motions are DENIED.[1] The government may introduce into evidence those portions of the tape recordings of the October 16, 1985, November 21, 1985, December 3, 1985, December 17, 1985, December 30, 1985 and January 27, 1986 conversations which they have not previously agreed to exclude.[2]

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1. The points for denoting conversations are derived from Exhibit 1 of the government's Memorandum in Support of Government's Answer to Defendants' Motion to Suppress Certain Tape Recorded Conversations. As neither the defendants nor the government have introduced into evidence the transcripts of the October 16, 1985, December 30, 1985 and January 27, 1986 conversations and as these tape recordings were not played at the earlier trial of the thirteen Roofers Union defendants, the court has relied upon the summaries of the conversations submitted by the government, the accuracy of which the defendants have not challenged.

2. The government informed the court at the hearing that it will not seek to introduce into evidence at trial those portions of the conversations to which the defendants object, which involve discussion of Robert Medina and his arrest.

Defendants seek to suppress seven conversations intercepted by the government on the grounds that the tape recorded conversations involve confidential attorney-client communications protected by the attorney-client privilege, and that the interception of these privileged communications reflects a failure on the part of the government to minimize electronic surveillance in accordance with 18 U.S.C. §2510, et seq.

[Discussion of unrelated issue omitted.]

In addition, defendants argue that the government agents who surveilled these defendants heard these conversations, knew them to be privileged attorney-client conversations, yet failed to interrupt their electronic surveillance so as to minimize the interception of any further privileged communication. The defendants have failed to meet their burden of establishing the privileged nature of the communications at issue here, and have no valid claim for suppression for failure of the government to minimize under 18 U.S.C. §2518(5). *See United States v. Traitz, Jr.*, 85-2012, slip op. (E.D. Pa. June 25, 1987) (Giles, J.) (filed under seal). Likewise, I agree with Judge Giles that the government's failure to identify defendants Fisher and Bloom as interceptees in the November 22, 1985 Interception Order and Application does not require suppression here. *See United States v. Donovan*, 429 U.S. 414, 439 (1977); *Traitz, Jr.*, slip op. at 86-88. In addition, I find that there has been no failure by the government to minimize any non-pertinent matters which are not covered by the attorney-client privilege. The recording by the agents of non-criminal conversations on November 21, 1985 was objectively reasonable under the circumstances, and I cannot see how the peripheral matters which were taped prejudice these defendants. *See Scott v. United States*, 436 U.S. 128 (1978); *United States v. Cortese*, 568 F. Supp. 119, 124 (M.D.Pa. 1983); *United States v. Geller*, 560 F. Supp. 1309, 1325 (E.D.Pa. 1983). As I stated at the hearing, I credit the testimony of Assistant United States Attorney Richard Scheff, and I find that the fact that the FBI agents assigned to the electronic surveillance in this case initialled the last page of the

affidavit in support of electronic surveillance of Agent Quinn John Tamm, Jr. signifies that they read the entire package including the order of Judge Giles authorizing the surveillance and the application of the United States. Regardless, the agents were given minimization instructions which contained sufficient information to apprise the agents of the proper procedures to employ while conducting the surveillance, so as to avoid the interception of non-pertinent matters, and a conference was held to explain these instructions to the agents. Government's Answer to Defendants' Motion for an Evidentiary Hearing, Exhibits A, B. As there is no evidence of a failure on the part of the agents to appropriately minimize, defendants' most recent Motion for an Evidentiary Hearing Or, In the Alternative, An Order Suppressing Tape-Recorded Conversations is DENIED.[5]

BY THE COURT:

/s/ MARVIN KATZ

Marvin Katz, J.

5. In addition, I incorporate herein the findings of my bench opinion and Judge Giles' opinion as to the minimization issue.

APPENDIX G(1)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER AUTHORIZING THE INTERCEPTION OF ORAL COMMUNICATIONS OCCURRING IN THE BUSINESS MANAGER'S OFFICE AND THE BUSINESS AGENT'S MEETING ROOM AT ROOFERS LOCAL 30 UNION HALL 6447 TORRESDALE AVENUE, PHILADELPHIA, PENNSYLVANIA	:	MISCELLANEOUS NO. 85-2012

ORDER

Application under oath having been made before me by Richard L. Scheff, Assistant United States Attorney for the Eastern District of Pennsylvania, and a "Investigative Law Enforcement Officer" as defined in Section 2510 (7) of Title 18, United States Code, for an order authorizing interception of oral communications pursuant to Section 2518 of Title 18, United States Code and full consideration having been given to the matter set forth therein the Court finds that:

(a) There is probable cause to believe that Stephen Traitz, Jr., Harry Joseph, Michael "Nails" Mancini, James Nuzzi, Robert Medina, Robert Crosley, Ernest Williams, Joseph Traitz and Richard Schoenberger and others as yet unknown, have committed and/or committing offense prohibited and punishable under (1) Section 1962 (c) and (d) and 1963 of Title 18, United States Code (involving, conducting or participating in the conduct of the affairs

of an enterprise that engages in, or the activities of which affect, interstate commerce, through a patternof racketeering activity and conspiracy in connection therewith) and (2) Section 1955 of Title 18, United States Code, mainly prohibition of business enterprises of gambling, and the conspiracy to do so, Section 894 of Title 18, United States Code, namely collection of extensions of credit by extortionate means and the conspiracy to do so, Section 664 of Title 18, embezzlement from pension and welfare funds, Section 1952 of Title 18, interstate travel, transportation in aid of racketeering enterprises, Section 844 of Title 18, United States Code, unlawful use of explosives, and Section 501 (c) of Title 29, United States Code, embezzlement of common funds.

There is probable cause to believe that particular oral communications of Stephen Traitz, Jr., Michael "Nails" Mangini, Harry Joseph, James Nuzzi, Robert Medina, Robert Crosley, Ernest Williams, Joseph Traitz and Richard Schoenberger, and others yet unknown concerning the above offenses, will be obtained through the interception of said oral communications, authorization for which is herewith been applied. In particular, these oral communications will concern the identities of the victims of the alleged extortionate credit transactions, racketeering activity, prohibited gambling enterprises, amounts extorted, terms of the

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Assistant Attorney General, Criminal Division, United States Department of Justice, who has been specifically designated by the Attorney General of the United States to exercise the power conferred upon him by Section 2516, Title 18, United States Code do the following:

(a) Intercept oral communications of Stephen Traitz, Jr., Michael "Nails" Mangini, Harry Joseph, James Nuzzi, Robert Medina, Robert Crosley, Ernest Williams, Richard Schoenberger and Joseph Traitz, and others as yet unknown in the Business Manager's Office in the Business Agent's Meeting

Room of Roofers Local Union 30 Union Hall located at 6447 Torresdale Avenue, Philadelphia, until communications and conversations that are intercepted reveal the manner in which and by means by which Stephen Traitz, Jr., Michael "Nails" Mangini, Harry Joseph, James Nuzzi, Robert Medina, Robert Crosley, Ernest Williams, Richard Schoenberger and Joseph Traitz, and others as yet unknown have engaged in and are engaging in the commission of the above described offenses that will reveal the identities of their confederates, their places of operation, and the nature of the illegal organization activities involved herewith, all in order to support the prosecution or for a period of 30 days from the date of this Order whichever is earlier.

(b) To conduct said interception until sufficient evidence is contained about the activities of Stephen Traitz, Jr., Michael "Nails" Mangini, Harry Joseph, James Nuzzi, Robert Medina, Robert Crosley, Ernest Williams, Richard Schoenberger and Joseph Traitz, and others as yet unknown in regard to the offenses specified – particularly about the origins, nature, extent, scope, membership, purpose, methodology and operations of the described

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enterprises – to support prosecution, and therefore, not to terminate the interception process automatically when the described type of communications first has been obtained, but to continue that process until the authorized objectives of the investigation as aforesaid have been obtained – providing, however, that: (1) the interception process shall terminate automatically when the authorized objectives of the investigation as aforesaid have been achieved or in any event not latter than 30 days from the date of this order, whichever occurs first; (2) The interception process shall be conducted in such ways as to minimize interception of communications not otherwise subject to interception under Chapter 119, Title 18, United States Code, pursuant to procedures described in the affidavit of

Special Agent (SA) Quinn John Tamm, Jr., related hereto; (3) This order shall be executed as soon as practicable; and (4) That the contents of all such intercepted oral communications shall be reported and preserved in such ways as to protect against editing and alteration.

(c) To obtain necessary services and assistance pursuant to Title 18, United States Code, Section 2518 (4) from the Bell Telephone Company of Pennsylvania (a communications common carrier as defined in Title 18, United States Code, Section 2510 /10/) in regards to furnishing of any and all information, facilities or other technical assistance necessary to accomplish the installation, repairing, maintenance, use and removal of oral interception equipment unobtrusively — provided that such assistance will be obtained with a minimum of interference with the services or

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operations of said carrier and that any such facilities or technical assistance furnished by said carrier shall be compensated for by the United States at the prevailing rate.

(d) During the period of 30 days from the date of this order to enter and re-enter surreptitiously with the minimum of intrusion necessary, including, without limitation, breaking and entering at night time or otherwise, without the consent of the owner or lawful tenant, the premises known as the Business Manager's Office and the Business Agent's Meeting Room at Roofers Local Union 30 Union Hall, located at 6447 Torresdale Avenue, Philadelphia, Pennsylvania, to install (including without limitations to survey such offices in connection with such installations) repair, maintain, and remove the oral interception devices authorized by this order to accomplish the oral interceptions.

IT IS FURTHER ORDERED, that the Bell Telephone Company of Pennsylvania shall furnish the Federal Bureau of Investigation such information, facilities and technical assistance

as are necessary to accomplish the oral interception unobtrusively and with a minimum of interference, and that the furnishing of such facilities or technical assistance by the Bell Telephone Company of Pennsylvania shall be compensated by the United States at the prevailing rate; and

IT IS FURTHER ORDERED, that the furnishing of said information, facilities and technical assistance shall terminate 30 days from the date of this order unless otherwise ordered by this Court and that the Bell Telephone Company of Pennsylvania, its agents and employees shall not

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disclose to anyone the existence of this order or this investigation until further order of the Court; and it is further ordered that the order, application, all exhibits thereto relating to the above captioned interception of oral communications, be sealed pending further order of this Court;

IT IS FURTHER ORDERED, that the Assistant United States Attorney, Richard L. Scheff of this District, shall provide the Court with a report on or about the seventh, fourteenth, twentieth, and twenty-eight days following the date of this order showing what progress has been made toward achievement of the authorized objectives and the need for continuing interception.

/s/ JAMES T. GILES

JUDGE
U.S. DISTRICT COURT

DATE: 10/24/85

LOCATION: Philadelphia, Pennsylvania

TIME: 9:05 a.m.

A TRUE COPY CERTIFIED TO FROM THE RECORD
DATED: October 24, 1985

ATTEST: /s/ Linda C. Chiaislio

DEPUTY CLERK, UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

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APPENDIX G(2)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER AUTHORIZING THE INTERCEPTION OF ORAL COMMUNICATIONS OCCURRING IN THE BUSINESS MANAGER'S OFFICE AND THE BUSINESS AGENT'S MEETING ROOM AT ROOFERS LOCAL 30 UNION HALL 6447 TORRESDALE AVENUE, PHILADELPHIA, PENNSYLVANIA	:	MISCELLANEOUS NO. 85-2012

AFFIDAVIT

Quinn John Tamm, Jr., being duly sworn according to law, upon his oath, disposes and says:

1. I am a Special Agent (SA) with the Federal Bureau of Investigation (FBI), United States Department of Justice, (USDOJ) and an "investigative law enforcement officer of the United States" within the meaning of Section 2510(7), Title 18, United States Code; that is an officer of the United States who is empowered by law to conduct investigations of and to make arrests for offenses enumerated in Section 2516, Title 18, United States Code.

2. This Affidavit is submitted in support of an application for an Order authorizing interception of oral communications by Stephen Traitz, Jr., Harry Joseph, Michael "Nails" Mangini, Robert Medina, Robert Crosley, Ernest Williams, James Nuzzi, Richard Schoenberger and Joseph Traitz, in the Business Manager's Office and the Business Agent's Meeting Room of Roofer's Local Union 30 Union Hall at 6447 Torresdale Avenue, Philadelphia, Pennsylvania.

3. I have been a Special Agent of the FBI for ten and one half years, nine of which have been spent investigating cases related to labor racketeering and organized crime activity. For the past nine years I have been assigned to the Philadelphia Division of the FBI and I have been engaged in the investigations relating to labor racketeering activities. Since May 1976 I have participated in investigations of criminal activities related to Roofers Local Union 30 and in particular, as they relate to the activities of certain individuals mentioned in this Affidavit that are affiliated with the said union.

4. I have participated in this investigation and I am presently supervising the authorized interception of oral communications occurring at the Business Manager's Office and the Business Agent's Meeting Room at Roofers Local Union 30 Union Hall, 6447 Torresdale Avenue, Philadelphia, Pennsylvania. The sources of information for this Affidavit are conversations that have been intercepted and monitored during the course of the authorized interception of oral communications occurring in the Business Manager's Office in the Business Agent's Meeting Room at Roofers Local Union 30 Union Hall, 6447 Torresdale Avenue, Philadelphia, Pennsylvania, by the authority of an order assigned miscellaneous number 85-2012 of the United States District Court for the Eastern District of Pennsylvania.

5. The facts and circumstances of this investigation as set forth below show that:

(a) There is probable cause to believe that Stephen Traitz, Jr., Harry Joseph, Michael "Nails" Mangini, Robert Medina, Robert Crosley, Ernest Williams, Richard Schoenberger, James Nuzzi, Joseph Traitz, and others as yet unknown, associated in fact as an enterprise as defined in section 1961 (4), Title 18, United States Code have committed and are conspiring to commit offenses, in the conduct of said enterprises affairs, involving mail fraud, extortionate collection of credit, an illegal gambling enterprise, interstate travel in aid of racketeering, arson, theft or embezzlement from an employee benefit plan, embezzlement of union funds (racketeering) in violation of Title

18, United States Code Sections 1962(c) and (d) 1963, 1341, 894, 1955, 1952, and 664, and Title 29, United States Code Section 501(c).

(b) There is probable cause to believe that the Business Manager's Office and the Business Agent's Meeting Room of Roofers Local Union 30 at 6447 Torresdale Avenue, Philadelphia, Pennsylvania, will be used by the above described individuals, and others yet unknown, in connection with the aforementioned offenses.

(c) There is probable cause to believe that evidence of the above described offenses will be obtained through the continuing interception of certain oral communications of Stephen Traitz, Jr., Harry Joseph, Michael "Nails" Mangini, Robert Medina, Robert Crosley, Ernest Williams, James Nuzzi, Richard Schoenberg, and Joseph Traitz and others yet unknown in the Business Manager's Office and the Business Agent's Meeting Room at the Roofers Local Union 30 Union Hall, located at 6447 Torresdale Avenue, Philadelphia, Pennsylvania.

(d) Normal investigative procedures are reasonably unlikely to succeed, infeasible, or too dangerous to pursue.

(e) The interception of oral communications of Stephen Traitz, Jr., Harry Joseph, Michael "Nails" Mangini, Robert Medina, Robert Crosley, Ernest Williams, James Nuzzi, Richard Schoenberger, Joseph Traitz and others yet unknown in the Business Manager's Office and Business Agent's Meeting Room at the Roofers Local 30 Union Hall, 6447 Torresdale Avenue, Philadelphia, Pennsylvania, is expected to continue to result in the identification of victims of the alleged racketeering activity, the methods of operating illegal gambling businesses and methods of extortionate collections of credit, the terms of the extortionate collections of credit, the location where the extortion payments will be made, the form of such payments, the manner in which the proceeds of the collection of each of these payments are to be distributed, the identities of those persons who are to share in the proceeds as such payments, a scheme to defraud using the U.S. Mails, the indentity of persons who plan to travel interstate to commit arson, the nature of the scheme to defraud and embezzle funds from the legal fund of Roofers Local

Union 30, the nature and precise scope of the conspiracy to commit racketeering acts and the identities and roles of these and other co-conspirators. In addition, intercepted communications should constitute admissable evidence of the above described offenses.

BACKGROUND FACTS

6. Roofers Local 30, hereinafter referred to Local 30, is a labor organization engaged in the activity of representing individuals employed as roofers, waterproofers, damp workers, helpers and related occupations. As such, Local 30 is the organization which represents all hourly wage employees employed in the roofing portion of the construction industry in Philadelphia and Southern New Jersey.

7. I have received information from Francis W. Hober, Assistant to the Regional Director of the National Labor Relations Board (NLRB), Philadelphia that Local 30 has been certified as a Collective Bargaining Entity by the NLRB. I have personal knowledge that Local 30 files annual reports (LM-2 Forms) with the Department of Labor which are required by the Labor Management Reporting and Disclosure Act, Title 29, United States Code Section 401, *et sec.* Filing of such forms is only required by those labor organizations, such as Local 30, which represent individuals and industries involved in or affecting interstate commerce.

STEPHEN TRAITZ, JR.

8. Local 30 is headquartered at 6447 Torresdale Avenue, Philadelphia, Pennsylvania, where it represents employees engaged in the roofing trade and the general building construction industry. Local 30 was headed by John McCullough until December 1980 when he was murdered on the orders of Raymond "Long John" Martorano, and Albert Daidone; a murder for which they were both convicted. Daidone was the Vice President of the Hotel Employees and Restaurant Employees International Union Local 54, which represented employees of the Atlantic City casino industry. This murder was motivated

by McCullough's efforts to form a rival bartenders union in Atlantic City. McCullough was succeeded by John "Jack" Kincade, as head of the union utilizing the title Business Manager. Kincade remained as a Business Manager of Local 30 until January 1985 when he was succeeded by Stephen Traitz, Jr. as Business Manager. Previously, Traitz had been a Business Agent and the Assistant Business Manager of Local 30.

HARRY JOSEPH

9. Harry Joseph, aka Harry DeAngelo, caucasian male, born November 25, 1934, resides at 2112 Gregg Street, Philadelphia, Pennsylvania. Joseph is closely associated with Alfonzo J. Parisse, aka Al Fontaine, Al Parisse, Americo Parissi; Saul Kane, and Nicodemo Scarfo. Parisse and Kane are two individuals with extensive arrests and prosecution records for gambling and loan sharking. Kane has also been convicted federally of Hobbs Act Extortion. Scarfo has been convicted of second degree murder and Federal firearms violations.

MICHAEL "NAILS" MANGINI

10. Michael "Nails" Mangini is a caucasian male, born August 6, 1941. He resides at 1833 Overlook Road, Langhorne, Pennsylvania and his FBI Number is 36405ID. Mangini has been employed intermittently as a business agent and union organizer for Roofers Local 30 and is presently employed as a business agent. He has a police record of arrests and prosecutions for aggravated assault and gambling.

ROBERT MEDINA

11. Robert Medina is a caucasian male, date of birth June 6, 1937. Medina was recently appointed as a business agent by Stephen Traitz, Jr. He has a police record for arrests and prosecutions for aggravated assault and armed robbery.

JAMES NUZZI

12. James Nuzzi is a caucasian male, date of birth March 14, 1953, and resides in Medford, New Jersey. He was appointed this year as a Business Agent of Roofers Local 30. He has a police record of arrests and prosecutions for aggravated assaults.

ERNEST WILLIAMS

13. Ernest Williams is a Business Agent of Roofers Local 30. Williams resides at 273-C High Street, Andalusia, Pennsylvania. His date of birth is February 28, 1939.

ROBERT CROSLEY

14. Robert Crosley is a Business Agent of Roofers Local 30. His date of birth is August 25, 1936. He resides at 8817 Revere Street, Philadelphia, Pennsylvania.

RICHARD SCHOENBERGER

15. Richard Schoenberger is a caucasian male with date of birth November 4, 1955. He resides at 313 Conestoga Way, Norristown, Pennsylvania. He is a Business Agent of Roofers Local 30. Stephen Traitz, Jr. is his father-in-law.

JOSEPH TRAITZ

16. Joseph Traitz is a caucasian male with a date of birth September 29, 1960. He resides at 465 Kelman Road, Gilbertsville, Pennsylvania. He is a Business Agent of Roofers Local 30. Stephen Traitz, Jr. is his father.

FACTS AND CIRCUMSTANCES SHOWING PROBABLE CAUSE

17. On September 23, 1985, the Honorable James T. Giles, United States District Court Judge, Eastern District of

Pennsylvania, authorized the interception of oral communications occurring in the Business Manager's Office and the Business Agent's Meeting Room at Roofers Local 30 Union Hall, 6447 Torresdale Avenue, Philadelphia, Pennsylvania. On September 26, 1985, electronic surveillance commenced on both of the rooms described above.

18. On September 26, 1985, Robert Medina, and Ernest Williams, are overheard having a discussion with an unknown roofing contractor whose employees are represented for collective bargaining purposes by Local 30 B of the Roofers Union. Roofers Local 30 B is a subsidiary of Roofers Local 30, has as its business manager Stephen Traitz, Jr. and has business agents assigned to it who also are principals in this Affidavit; Robert Medina, Ernest Williams, Robert Crosley, James Nuzzi, Richard Schoenberger, and Joseph Traitz. During the conversation on September 26, 1985, Robert Medina tells the roofing contractor that he is short on making payments of dues money to Roofers Local 30 B. This is referred to as short on reporting hours. Medina tells the roofing contractor that he, Medina, is not going to be a nice guy. Medina and Ernest Williams depart the meeting room and return shortly thereafter at which time Williams is heard to slap the contractor demanding to know why the contractor was not paying more dues money to the union. Both Medina and Williams tell the contractor that he must report at least one hundred hours a month and pay the corresponding dues. Both Medina and Williams then tell him that this time he is lucky to get away with just a slap in the head.

19. On October 3, 1985, at approximately 8:30 a.m. Charles Murtaugh, a business agent of Roofers Local 30, and Robert Crosley hold a discussion in the Business Agent's Meeting Room of Roofers Local 30. This discussion involves the new policy of requiring the owners of small roofing companies, which are referred to as "Principals" to pay a certain amount of money each month. Other intercepted oral communications indicate that the "Principals" will be required to pay a minimum of 100 hours worth of dues money to the union a month. Murtaugh tells Crosley that you could get arrested for doing what the union is doing by demanding dues money from the

contractors for hours they have not worked. Crosley advises Murtaugh that other unknown union officers have discussed the practice with an attorney by the name of Bernard Katz and Katz has advised that this practice is legally permissible. Nevertheless, Murtaugh states that he thinks that the way its being conducted is extortion.

20. On October 4, 1985, at approximately 8:30 a.m. Robert Medina, Joseph Traitz, Richard Schoenberger, all business agents with Roofers Local 30, have a conversation with a roofing contractor by the name of Frank Griffin. They accuse Griffin of under-reporting the hours that he has worked as a Principal to Roofers Local 30 B. Griffin is asked to leave the Business Agents Meeting Room where this discussion is occurring and Medina, Traitz, and Schoenberger discuss how to handle Griffin. Joseph Traitz is insistent that Griffin be "slapped around" however, Medina cautions against using that method of collecting money from Griffin because he is a retired Philadelphia Police Officer. Griffin is told to re-enter the Business Agents Meeting Room and he is told he must report 100 hours a month as a Principal whether he works 100 hours nor not. Griffin replies that he does not know the definition of a "Principal." Schoenberger gets up and says to Griffin that he should be beaten up for his insolence and then exits the room. Griffin is told to leave and report back later.

21. On October 11, 1985, at approximately 9:23 a.m. in the Business Agent's Meeting Room in Roofers Local 30, 6447 Torresdale Avenue, Philadelphia, Pennsylvania, Robert Medina, Richard Schoenberger, Stephen Traitz, III, and Joseph Traitz, hold a conversation with a roofing contractor identified only by the name "Roger". Michael "Nails" Mangini later enters the room and joins the conversation. Medina and Mangini discuss the fact that Medina would break Roger's face if he was another guy. Roger protests that he has been unable to work a lot and report hours to Roofers Local 30 because his wife has cancer. Mangini tells Roger that he has known him for a long time and because of that nothing is going to happen to him this time. Mangini does threaten Roger by implying that Roger does

not want to be called into the Union Hall again over the issue of payment of 100 hours worth of dues a month to Roofers Local 30.

22. On October 1, 1985, in the Business Agents Meeting Room of Roofers Union Local 30, 6447 Torresdale Avenue, Philadelphia, Pennsylvania, at approximately 10:08 a.m., Richard Schoenberger, Robert Crosley, and Business Agent Michael Daly are discussing an individual by the first name of Murray. Murray is employed as a salesman by Nate Ben's Reliable Furniture Store on Market Street in Philadelphia, Pennsylvania. Robert Crosley states that Murray owes $20,000. Murray won $2,700 on the Monday night football game on September 30, 1985, but he lost $1,800 on the over/under score. Robert Crosley, based on the conversation, appears to be reading from a ledger card or some document that contains these figures.

23. On September 30, 1985, in the Business Manager's Office of Roofers Local Union 30, Stephen Traitz, Jr. has a conversation with an unknown individual at approximately 2:42 p.m. At that time, Traitz mentions that Roofers Local Union 30 is still paying the monthly leasing charge on the automobile operated until June 21, 1985 by Robert Medina. Traitz complains that he has to pay leasing payments both on Medina's first car for which at that time he gives no further explanation and a second car presently leased by Medina. Later in the Business Manager's Office at approximately 2:59 p.m. Stephen Traitz, Jr. makes a comment about getting another automobile for Medina.

24. The affiant interviewed on July 31, 1985, John B. "Jack" Foley, Partner, William Hyndman, III, Insurance Agency, Rydal Executive Plaza, Rydal, Pennsylvania, concerning the automobile insurance policy on Roofers Local Union 30. At that time Foley stated that this policy had been placed by his agency with Centennial Insurance Company and had the policy number 371020808. Foley further stated that a claim recently had been made against the policy for the theft of one of the automobiles leased by Roofers Local Union 30 from Fidelcor Services, Inc., a related company to Fidelity Bank of Philadelphia. Foley explained that on June 24, 1985, he was at the offices of Roofers Local Union 30 at 6447 Torresdale Avenue, Philadelphia, Pennsylvania, to meet with the Employee Benefit Plan

administrator, Edward Hurst. At that time, Foley recalls that someone, and he does not remember exactly who, mentioned that a motor vehicle leased by Roofers Local Union 30 had been "stolen" the previous Friday, which would be June 21, 1985. Foley was told that a claim would be filed against the insurance policy from Centennial Insurance Company.

25. On July 31, 1985, John B. "Jack" Foley, Partner, William Hyndman, III, Insurance Agency, Inc., Rydal Executive Plaza, Rydal, Pennsylvania, stated that his insurance agency had received via the U.S. Mail, a letter from the United Union of Roofers, Waterproofers, and Outside Workers, AFL-CIO, Local 30, 6447 Torresdale Avenue, Philadelphia, Pennsylvania. This is the official name of Roofers Local 30. This letter was dated July 3, 1985 and addressed to a Ms. Linda Ryan, William Hyndman, III, Insurance Agency, Inc., Rydal Executive Plaza, Post Office Box 148, Rydal, Pennsylvania 19046. The letter stated:

> Dear Ms Ryan:
>
> As per telephone conversation with Joseph Barbardo, I am enclosing herewith a copy of our lease agreement with Faulkner Oldsmobile for a car usually driven by Bob Medina.
>
> This is the car that was stolen and then found by the Bensalem Township Police. It was burned and is a total loss.
>
> I am not sure if the lease total amount is the true value of the car. I will contact Fidelcor Services, Inc. to determine the true value. Also, please keep in mind that we had installed a two-way radio in this car as we do with all our cars. The value of this radio is $2,525.
>
> Please advise should you require any further information.
>
> Sincerely,
> Tina Collins
> Office Manager

Foley explained that Linda Ryan is actually a claims examiner for the Atlantic Companies, the parent company of Centennial Insurance Company of Ambler, Pennsylvania. Based on this letter received from Roofers Local 30, a standard automobile loss claims form was forwarded from the William Hyndman Insurance Agency, to Centennial Insurance Company, Ambler, Pennsylvania, via the U.S. Mail. This form which was dated June 24, 1985, initiated a claims procedure.

26. On October 4, 1985, at approximately 8:30 a.m. on the sidewalk in front of 401 Kismet Street, Philadelphia, Pennsylvania, the affiant and Special Agent William P. Grace, Federal Bureau of Investigation, interviewed Tina Collins. Mrs. Collins identified herself as the Office Manager of Roofers Local Union 30, at 6447 Torresdale Avenue. Mrs. Collins was displayed the previously described letter which she apparently wrote to Ms. Linda Ryan, and dated July 3, 1985. Mrs. Collins was given an opportunity to read a photo copy of this letter and then her attention was directed to the second paragraph of the letter which states "This is that car that was stolen and then found by the Bensalem Township Police. It was burned and is a total loss." Mrs. Collins was asked who asked her to forward this letter to the William Hyndman, III, Insurance Agency, Inc., and specifically who provided her with the information that the motor vehicle in question was stolen. Mrs. Collins initially stated that she did not recall who asked her to send the letter but then stated that she had received that information from Business Agent Robert Medina. She further stated that he also provided her with the information that the car was stolen and then found by the Bensalem Township Police. Mrs. Collins was then given a Federal Grand Jury Subpoena that required her appearance before the Federal Grand Jury on October 10, 1985. Mrs. Collins stated that she would attend this hearing.

27. On October 4, 1985, at approximately 9:02 a.m. Tina Collins advises Stephen Traitz, Jr. in the Business Manager's Office of Roofers Local 30, 6447 Torresdale Avenue, Philadelphia, Pennsylvania, that she had just been served with a Federal Grand Jury Subpoena by FBI agents. She specifically mentions the name of the affiant who had provided her with a business

card. Collins tells Traitz that the Grand Jury is investigating the stolen union car previously assigned to Robert Medina and his potential involvement in the theft and arson of this motor vehicle. Collins then leaves the Business Manager's Office for a short period of time and returns and discusses with Stephen Traitz, Jr. what she should say about the car. Stephen Traitz, Jr. tells Collins to tell the truth.

28. On October 4, 1985, at approximately 9:05 a.m. Stephen Traitz, Jr. assembles the business agents that are available in the Business Agent's Meeting Room of Roofers Local 30, 6447 Torresdale Avenue, Philadelphia, Pennsylvania. He advises them at that time that Tina Collins, the Officer Manager, had been served earlier that day with a Federal Grand Jury Subpoena and that the focus of the Grand Jury Investigation involved the "theft" of Robert Medina's automobile. At that time, Stephen Traitz, Jr., admonishes the business agents not to allow people who are involved with narcotics or illegal drugs to utilize union cars. Robert Medina asks, "Are we talking about my car there, Steve?" Traitz responds, "Your car yeah, who the fucks car do you think we are talking about, sure your car." Medina then says, "The only guy who was in my car at the particular time that we are talking about drug guys was Frank Mahwinney." Traitz then says "This mother fucker (the affiant) said some bad things about you that I will tell you private. Sure I'm talking about your car, I told you that it was a bad fucking thing, I told you that it was bad thing to do. It's over now, but it ain't over. I hope this fucking broad (Tina Collins) holds tight. That's another thing, you gotta be careful with what the broads (office secretaries) fucking know. You gotta — you know. All right, that's what I was going to tell you. Come here Bobby (Medina) I want to see you." Then at approximately 9:08 a.m. on October 4, 1985, in the Business Manager's Office or Roofers Local Union 30, 6447 Torresdale Avenue, Philadelphia, Pennsylvania, the following conversation took place and is summarized. Stephen Traitz, Jr. speaking to Robert Medina, states that, "this mother fucker (the affiant) told her (Tina Collins) that you were a cocaine addict and that they had been watching you and that you are into all kinds of fucking shit." Traitz relates that

he told Tina Collins that "we might eventually poke a guy in the fucking nose but I said that this guy, (the affiant) is a piece of shit, trying to see how strong you are." Traitz tells Medina that Tina Collins told him not to worry. Traitz then tells Tina Collins, as he relates to Medina, that Collins came to him and told him about the Subpoena and that the first thing that Tina Collins would be asked by the Federal Grand Jury was whether she had discussed her potential testimony with Traitz. Stephen Traitz, Jr. instructions to Tina Collins was to "tell the truth." Stephen Traitz, Jr. then whispers to Medina during this conversation that he "had to tell Tina to tell the truth." Stephen Traitz then tells Robert Medina not to think that Stephen Traitz, Jr. is "picking on him" but that Stephen Traitz, Jr. knew when Robert Medina "did what he did" with the automobile in question that he had plunged Stephen Traitz, Jr. into a "binder." Traitz reassures Medina that he is "still my fucking guy, but that you (Medina) should know that you have hurt me (Traitz) badly." Stephen Traitz, Jr. admonishes Robert Medina to be careful, to be "fucking careful." Robert Medina asks Stephen Traitz, Jr. whether Stephen Traitz, Jr. would have preferred to have Medina arrested at the accident scene under the influence of alcohol and having a "gun" in his car.

29. On October 4, 1985, at approximately 12:58 p.m. Stephen Traitz, Jr., and Tina Collins again discuss the Federal Grand Jury Subpoena that was served on Tina Collins at 8:30 a.m. that morning. Stephen Traitz, Jr. reassures Tina Collins and tells her that the "Feds" are looking for a weak link.

30. On October 10, 1985, Stephen Traitz, Jr. calls Tina Collins into his office, that is, the Business Manager's Office of Roofers Local 30, 6447 Torresdale Avenue, Philadelphia, Pennsylvania, to ask her about her Federal Grand Jury appearance. She tells Stephen Traitz, Jr. what she was asked at her Federal Grand Jury appearance. She reiterates to him the questions she was asked and what answers she gave. Stephen Traitz, Jr. asks her if she was asked about anybody in particular. Tina Collins replied that she was asked about Robert Medina. Tina Collins tells Stephen Traitz, Jr. that she testified to the Federal Grand Jury that the car was stolen and they had made a police report.

31. On October 10, 1985 at approximately 3:28 p.m. in the Business Manager's Office of Local 30, an unknown male talks about a prior appearance by him at the Federal Grand Jury. Stephen Traitz, Jr. is present and asks the name of the United States Attorney who conducted the questioning at Tina Collins' Federal Grand Jury appearance. Thomas Hamilton, a dispatcher at Roofers Local 30, had been assigned to accompany Collins to the U.S. Courthouse. Hamilton responded that the U.S. Attorney is named Scheff (Richard L. Scheff, Assistant United States Attorney, Eastern District of Pennsylvania). Stephen Traitz, Jr. says that this is most probably a fishing expedition. There is speculation that it happens to everyone who has a car suspiciously stolen. Stephen Traitz, Jr. says that since the "Feds apparently don't have anything he wants to get the $15,000 from the insurance company for the loss of the motor vehicle.

32. On August 2, 1985, Claims Supervisor, Charles W. Brownsholtz, The Atlantic Companies, Ambler, Pennsylvania, advised that a claims investigation had been instituted by the Centennial Insurance Company concerning the insurance policy of Roofers Local Union 30, 6447 Torresdale Avenue, Philadelphia, Pennsylvania. Brownsholtz stated that he received an automobile loss notice claims form from William Hyndman, III, Insurance Agency, Post Box 148, Rydal, Pennsylvania 19046. This claims form was sent to Centennial Insurance Company via the U.S. Mail. Brownsholtz stated that he assigned the case to Mrs. Linda F. Ryan Claims Assistant, for purpose of doing an initial investigation of the claim and assigned a claims examiner to the case.

33. On September 12, 1985, Donald G. Widdoes, Claims Investigator, Weeks-Worthing and Company, at Jenkintown, Pennsylvania, was interviewed by the affiant. At that time, he advised that he had himself interviewed Robert Medina and Stephen Traitz, Jr., in the Business Manager's Office at Roofers Local Union 30, 6447 Torresdale Avenue on September 4, 1985. At that time, Medina and Traitz stated to Widdoes that a 1985 Chrysler New Yorker Fifth Avenue Model had been stolen from the parking lot of Roofers Local 30, 6447 Torresdale Avenue on June 21, 1985. Medina advised Widdoes that he initially thought

that another business agent of Roofers Local 30 had borrowed the motor vehicle which is rented from Fidelcor Services, Incorporated. Medina went on to explained that they eventually reported that the car was stolen on June 24, 1985, to the Philadelphia Police Department (PHPD) and that Stephen Traitz, Jr., initiated the claim procedure with Centennial Insurance Company thereafter. Widdoes advised that he later received a handwritten statement that he had prepared that was signed by both Robert Medina and Stephen Traitz, Jr., and mailed to Widdoes by attorney Bernard Katz who represents Roofers Local 30. Widdoes later turned this letter over to the representatives of Centenial Insurance Company.

34. Police Officer Michael Ebner, Badge Number 9407 advised the affiant that on September 5, 1985, he interviewed Patrick David Dawson who related as follows. Dawson stated that he was driving his automobile, a 1971 Pontiac east on Red Lion Road at approximately 6:00 p.m., on June 21, 1985. As he crossed the intersection at the Roosevelt Boulevard in Philadelphia, Pennsylvania, a black 1985 Chrysler New Yorker, Fifth Avenue Edition, came north on the Boulevard in the curb lane, went through the red light and hit his right front bumper. Dawson further stated that he looked over at the car that hit him and the driver was laughing at him. Dawson further advised that his automobile stalled after the accident and that the Chrysler went east on Red Lion Road. Dawson restarted his car and followed the black Chrysler to Comly Street in Northeast Philadelphia. The car turned on to Comly Place which 15 a cul-de-sac and stopped. Dawson stated he along with Robert Norton, a friend of his who was in the car with him at the time, walked toward this motor vehicle. As Dawson and Norton walked toward the motor vehicle, the driver started the Chrysler and attempted to run over both of these individuals. Norton was struck in the right hand by the car and suffered a lacerated finger. Dawson was exhibited seven photographs of white males by Police Officer Michael Ebner and selected a photograph of Robert Medina, date of birth (DOB) is June 6, 1937, as the individual who was driving the previously described black Chrysler.

35. On October 4, 1985, at approximately 5:01 p.m. Stephen Traitz, Jr., Robert Crosley, and Michael "Nails" Mangini discussed the Grand Jury testimony of Tina Collins before the Federal Grand Jury on that date. During the conversation Traitz remarks that he told Tina Collins to tell the truth and that apparently the Federal Government is only engaged in a "fishing expedition." Traitz tells Mangini and Crosley that he is afraid of what Robert Medina will do if he gets into another traffic accident while he is intoxicated. Traitz states that he is involving the whole union in these problems. Traitz further describes Medina as a "dog" who is not capable of making a reasonable decision, and has to be controlled all the time. Stephen Traitz, Jr., again remarks that he wants to collect the money that the insurance company owes the union for the car.

36. Prior investigation by the affiant and other Special Agents (SA) of the FBI, Philadelphia, Pennsylvania, has determined that there is an employee benefits plan maintained by Roofers Local Union 30, known as the Legal Fund. This plan is administered directly by an attorney by the name of Herbert K. Fisher whose offices are at 113 South 21st Street, Philadelphia, Pennsylvania. On October 1, 1985, there was a conversation between Stephen Traitz, Jr., and Michael "Nails" Mangini where they discussed this legal services fund. Traitz is complaining about the fact that Herbert Fisher has divided loyalties between the Roofers Local Union 30 and the Fraternal Order of Police Lodge Number 5 in Philadelphia, Pennsylvania. Traitz remarks to Michael "Nails" Mangini that after the first of the year, that is, January, 1986, that control of the legal funds should be transferred to Edward Hurst, a business agent and an administrator of the employee benefit plans at the Roofers Local 30. Stephen Traitz, Jr., Michael "Nails" Mangini discussed the possibilities that would occur once the Legal Fund could hire lawyers independent of Herbert K. Fisher and his law firm. Stephen Traitz, Jr., in a whispering voice is heard to over say that once you get to know the lawyers who are being hired, you can "wack" their fees. Traitz further states that he wants to get control of the Legal Fund so they "can get something back" from it. This conversation occurred in the business Manager's Office

of Roofers Local Union 30, 6447 Torresdale Avenue, Philadelphia, Pennsylvania. The legal Fund of Roofers Local Union 30 is an employee benefit plan that is covered under the provisions of the Employee Retirement Income Security Act.

37. On October 3, 1985, in the Business Manager's Office, Stephen Traitz, Jr., Michael "Nails" Mangini and Harry Joseph are overheard discussing the fact that the Wheaton Glass Company of Vineland, N.J., is performing work on their own roof. Traitz remarks that a union contractor should be doing the work and states that if Wheaton Glass does the work, he will arrange for the destruction of a yacht owned either by the principal of the company or by the company itself. Traitz is overheard saying that he will have the yacht "blown up."

37A. On October 2, 1985, at approximately 2:05 p.m., in the Business Agents Meeting Room of ROOFERS LOCAL 30, 6447 Torresdale Avenue, Philadelphia, Pa., STEPHEN TRAITZ, JR. and JAMES NUZZI spoke with an individual identified as BOB, most probably ROBERT A. PETRONI. TRAITZ explains to BOB that he is embarrassed about a misunderstanding over the work of BOB's roofing company in New Jersey. STEPHEN TRAITZ, JR. says to BOB that he understands they have a "mutual friend" and because TRAITZ and BOB have this mutual friend that BOB has "immunity". TRAITZ states that this immunity means that BOB does not have to have a collective bargaining agreement with ROOFERS LOCAL 30. TRAITZ states because of this, BOB has saved over "$100,000.00" by not paying dues for his workers or money to the employee benefit plans of ROOFERS LOCAL 30. JAMES NUZZI later states that BOB will still have to sign a bonding agreement with ROOFERS LOCAL 30 so it will not look like a "sweetheart" deal.

On October 10, 1985, at approximately 8:44 a.m., in the Business Managers office of ROOFERS LOCAL UNION 30, 6447 Torresdale Avenue, Philadelphia, Pa., the following conversation was intercepted between STEPHEN TRAITZ JR. and ROBERT MEDINA: ROBERT MEDINA explains to TRAITZ that he is having problems with a union roofing contractor who wants concessions on a job. MEDINA further explains that this

contractor claims to be "backed" by the right people. STEPHEN TRAITZ JR. tells ROBERT MEDINA that if he (MEDINA) steps on the wrong people that "they" will come to TRAITZ. TRAITZ then tells MEDINA that he does not have to be easy on all "Italians" who claim to have backing of the "right people". The discussion continues about this "connected" contractor, who is represented by an attorney by the name of "KAPLAN".

DESCRIPTION OF ROOFERS LOCAL UNION 30, UNION HALL, 6447 TORRESDALE AVENUE, PHILADELPHIA, PENNSYLVANIA

38. Roofers Local Union Hall is located at 6447 Torresdale Avenue, Philadelphia, Pennsylvania; this is at the southeast corner of the intersection of Torresdale Avenue on Hellerman Street. The building is a single story structure which houses the offices and hiring hall of Roofers Local 30 and Roofers Local 30 B, subsidiary Labor Union. There are six major rooms in the building which is constructed of red brick. The electronic surveillance application for this building is for the Business Manager's Office and the Business Agents Meeting Room both of which are located in the Southeast corner of the building and adjacent at the rear entrance of 6447 Torresdale Avenue. To the rear of the building is a fenced in crushed stone parking lot surrounded by high razor wire topped fence which is utilized for parking by Roofers Local 30. The attached floor plan has been provided by SAs of the FBI who have been in this building during the prior electronic surveillance installation.

INADEQUACY OF TRADITIONAL INVESTIGATIVE TECHNIQUES

39. Based upon the information contained herein and my experience investigating and supervising the investigation of organized criminal activities and labor racketeering over the past nine years, I believe that Stephen Traitz, Jr., Michael "Nails" Mangini, Harry Joseph, James Nuzzi, Robert Medina, Ernest

Williams, Robert Crosley, Joseph Traitz, and Richard Schoenberger and others yet unknown are obviously involved in violations as set forth in paragraph 5 (a) of this affidavit. As a result of the information contained herein, the affiant believes that the interception of oral communications will result in obtaining the necessary evidence for a successful prosecution. There are no investigative techniques available at the present time, other than the interception of oral communications, which will result in the obtaining of the necessary evidence for a successful prosecution against all individuals engaged in the aforementioned violations. Evidence is unavailable from other investigative avenues.

40. Roofing contractors who have a collective bargaining relationship with Roofers Local 30 or members of Roofers Local 30 who are probable victims of other extortionate collection of credit activities have long time relationships with the union. Consequently it does not appear that an undercover agent posing as either a roofing contractor or as a union member could be introduced into the extortionate collection of credit process. Based upon my experience and the knowledge of the individuals involved in this investigation, it is my belief that an attempt to seek a grant of immunity for one of the subjects in this investigation would be unproductive. These individuals would be willing to suffer the penalties of criminal contempt before they would testify under a grant of immunity. Repeated efforts have been made in the past to solicit information from individuals who are close to the subjects of this investigation without success. All subjects of this investigation have resisted attempts to solicit information from them by the FBI, Pennsylvania Crime Commission, Pennsylvania State Police (PSP), New Jersey State Police or various other agencys. In addition, the testimony of anyone of the individuals in the alleged criminal activities would not, in and of itself, normally be sufficient for a successful prosecution. It would be necessary to develop corroborative evidence which would be extremely difficult once it became known that the FBI was actively investigating these alleged violations of extortionate collection of credit activities, mail fraud, and violations of the Employee Retirement Income

Security Act. Surveillance outside of Roofers Local 30 have been conducted, but only establish who is present at the Union Hall, not their activities.

41. The execution of a federal search warrant on Roofers Local Union 30, Union Hall at 6447 Torresdale Avenue, might produce some evidence of evidentiary value, however, it is my experience and the experience of other FBI agents who have investigated similar aforementioned violations in the past, that detailed meaningful records are not maintained by subjects involved in these types of violations. These records are sketchy in nature and contain code names of victims. Although records of this type will, most likely be sought at some point in the investigation, it is my belief that if the search were executed at this time, the investigative interest of the FBI would be compromised prematurely and would not ultimately result in successful prosecutions. Based on the above, my experience with the investigation of organized criminal activities and labor racketeering so much as the types set forth herein, it is my belief that the interception of oral communications involving the subjects set forth in paragraph two of this affidavit, is the only available means to successfully identify all of the participants in these criminal activities and the only method of investigation likely to provide the quantum of necessary evidence to support the prosecution.

42. For the reason set forth above, all normal methods of investigation have failed or reasonably appear unlikely to succeed if tried and the only reasonable method of developing necessary evidence of the aforementioned violations, by individuals named herein, this is to intercept the oral communications specified.

43. I further believe that based upon my experience and the experience of other agents working with me on this investigation, that after the described communications have first been intercepted additional communications of the same type will occur. The interception of more than one such communication will be necessary in order to determine the identities of the co-conspirators as already established and the extent and nature of their participation sufficient to secure conviction. In addition,

continued interception will be necessary to identify all the participants in the gambling, mail fraud and the extortionate collection of credit, (racketeering). For these reasons, electronic surveillance should not be terminated upon the interception of first described types of conversations, but should continue until the object of the investigation is obtained for a period of 30 days from the date of the order, which ever occurs earlier.

MINIMIZATION

44. The premises known as Roofers Local 30 Union Hall, at 6447 Torresdale Avenue, Philadelphia, Pennsylvania, from which the oral communications are sought to be intercepted is an office type building and individuals other than those named in paragraph 2 may use the Business Manager's Office and the Business Agent's Meeting Room. In this regard, special care will be taken to avoid the interception of oral communications not otherwise subject to the interceptions under chapter 119, Title 18, United States Code. Because of its location, fixed surveillance of Roofers Local 30 is impractical and would reveal the FBI's investigation. However, spot checks and intermittent surveillances will be conducted as they have been conducted to date, consistent with maintaining the security of the investigation, to determine if any of the named interceptees are present at Roofers Local 30.

45. The interception will be suspended immediately when it is determined through physical surveillance or otherwise if none of the named interceptees or any of their confederates when identified, as participants in the conversations, are present, unless it is determined during the portion of the conversation already overheard that the conversations are criminal in nature. Even if none of the named interceptees or any of their confederates, when identified, are participants in the conversations, monitoring will be suspended if the conversation is not criminal in nature or otherwise related to the offenses under investigation. The term "criminal in nature" refers to communications disclosing evidence of past, present or future crime.

46. I am aware of the problems of conducting electronic surveillance in an area that may have some public access. I have no interest in the interception of oral communications involving individuals who are not involved in the conversations concerning the events described herein.

47. Richard L. Scheff, Assistant United States Attorney (AUSA), and I will ensure that appropriate standards and minimization will be followed. Upon issuance of the court order requested in this affidavit, Richard L. Scheff, AUSA and I will carefully explain the minimization standards set forth herein and the subject court order to the monitoring agents. Special Agents of the FBI involved in the interception, monitoring and recording requested here will be instructed to minimize monitoring, interception or recording of individuals not listed in this affidavit as interceptees, except where there are indications that those intercepted could be involved in the offense or offenses which have been previously mentioned in this affidavit. Special Agents involved in this electronic surveillance will also be instructed to avoid the interceptions, monitoring and recording of individuals involved in these conversations and other activities which would be considered personal or unrelated to offenses involving violations of law. Furthermore, Special Agents involved will be required to read and initial the instructions for minimization as well as this affidavit, and the court order prior to the initiation of electronic surveillance.

OTHER APPLICATIONS

48. Harry Joseph is a name interceptee in an order signed by United States District Judge Donald W. Van Artsdalen, Eastern District of Pennsylvania (EDPA), dated May 30, 1985. This oral interception in the automobile of Alfonso Parisse concerned racketeer influenced and corrupt organizations and illegal gambling activities. Michael "Nails" Mangini and Stephen Traitz, Jr., were both identified as principals in an order issued by the Honorable Clarence C. Newcomer, United States District Court Judge, Eastern District of Pennsylvania, signed April 25, 1978. This interception dealt with illegal gambling

businesses. On June 27, 1980, the Honorable Raymond Broderick, U.S. District Court Judge, EDPA, authorized the interception of wire communications from the Waiting Room Bar and Grill, 8212 Roosevelt Boulevard, Philadelphia, Pennsylvania. Both Stephen Traitz, Jr., and Michael "Nails" Mangini were named as principals. On September 23, 1985, the Honorable James T. Giles, United States District Court Judge, for the Eastern District of Pennsylvania signed an order assigned miscellaneous number 85-2010 authorizing the interception of the oral communications of Stephen Traitz, Jr., Harry Joseph, Michael "Nails" Mangini, James Nuzzi and Robert Medina. The information obtained from that interception of oral communications is the basis for probable cause in this affidavit.

INSTALLATION

49. For proper installation, repair, and concealment of an electronic surveillance device, it may be necessary for Special Agents of the FBI to make several surreptitious entries in the premises known as Roofers Local 30, Union Hall, 6447 Torresdale Avenue, Philadelphia, Pennsylvania. Presently, equipment has already been installed to conduct electronic surveillance, however during the period specified in the affidavit for interception of oral communication, it may be necessary to add equipment or repair equipment. Because of this, it is expected that several entries may be necessary because of the inherent difficulty in placing concealed microphones and conducting the necessary wiring.

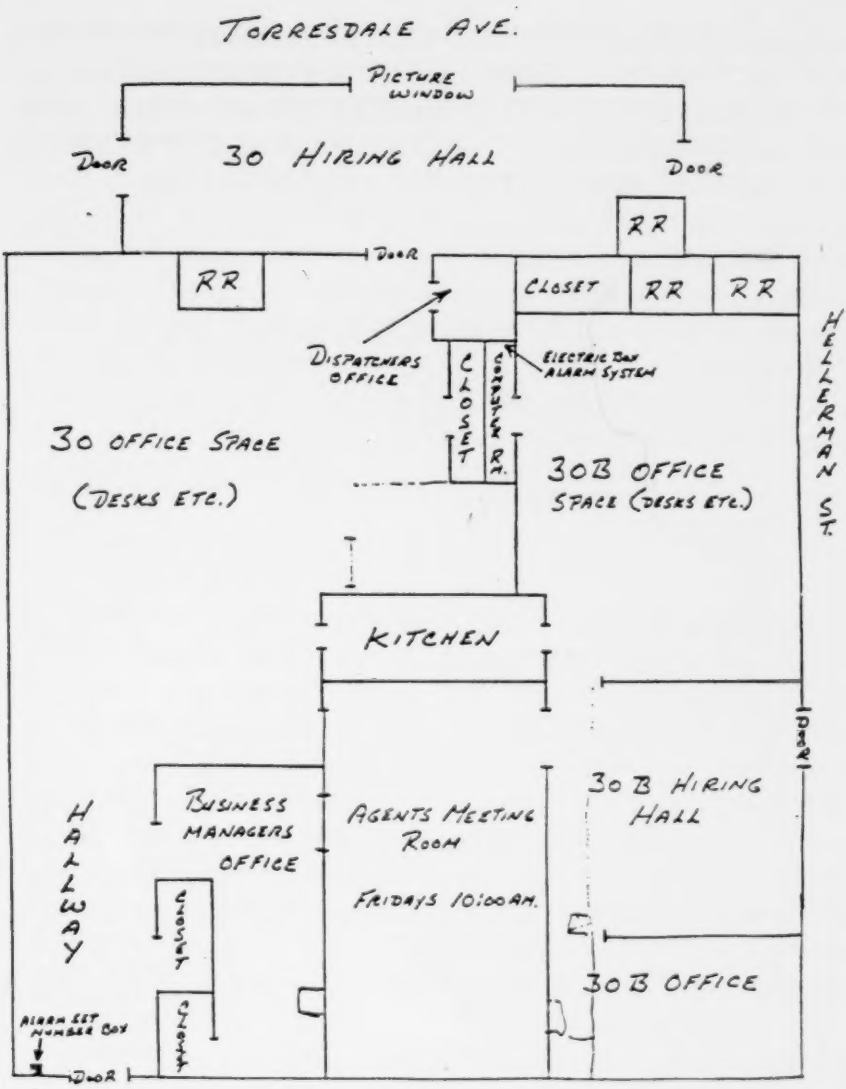
50. Therefore, I respectfully submit that there is probably cause to believe that Stephen Traitz, Jr., Joseph, James Nuzzi, Michael "Nails" Mangini, Robert Medina, Ernest Williams, Robert Crosley, Joseph Traitz, and Richard Schoenberger and others as yet unknown, have committed are committing, and are about to commit the above described offenses. I further have probable cause to believe as described above, that these individuals are about to engage in conversations at the Business Manager's Office and Business Agent's Meeting Room, Roofers Local 30, 6447 Torresdale Avenue, Philadelphia, Pennsylvania.

RE: IN THE MATTER OF THE APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER AUTHORIZING THE INTERCEPTION OF ORAL COMMUNICATIONS OCCURRING AT 6447 TORRESDALE AVENUE, PHILADELPHIA, PENNSYLVANIA

/s/ QUINN JOHN TAMM, JR.
SPECIAL AGENT
FEDERAL BUREAU OF
INVESTIGATION

Sworn to and subscribed in my presence this 24th day of October, 1985.

/s/ JAMES T. GILES
UNITED STATES DISTRICT
COURT JUDGE


TORRESDALE AVE.
PICTURE WINDOW
DOOR
30 HIRING HALL
DOOR
RR
DOOR
RR
CLOSET
RR
RR
DISPATCHERS OFFICE
CLOSET
COMPUTER RM.
ELECTRIC BOX ALARM SYSTEM
HELLERMAN ST.
30 OFFICE SPACE
(DESKS ETC.)
30B OFFICE SPACE (DESKS ETC.)
KITCHEN
DOOR
HALLWAY
BUSINESS MANAGERS OFFICE
AGENTS MEETING ROOM
FRIDAYS 10:00 AM.
30B HIRING HALL
CLOSET
CLOSET
30B OFFICE
ALARM SET NUMBER BOX
DOOR

No. 89-1942 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1990

HERMAN BLOOM and HERBERT K. FISHER,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

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QUESTIONS PRESENTED

1. Whether a court order authorizing the extension of previously authorized electronic surveillance was "insufficient on its face" under 18 U.S.C. 2518 (10) (a) (ii) because one page of the proposed order was missing from the package when the judge signed the order.

2. Whether petitioner Bloom was improperly convicted of aiding and abetting the payment of a kickback to influence the operation of an employee welfare benefit plan, in violation of 18 U.S.C. 1954, without proof that he took any steps to demonstrate his willful participation in the crime.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals affirming petitioners' convictions (Pet. App. A1-A14) are not yet reported, but are noted at 898 F.2d 142 and 143 (Table). The opinion of the district court denying petitioners' motions to suppress (Pet. App. A18-A29) is upreported. The opinion of the district court denying petitioners' motions to dismiss the indictment is reported at 692 F.Supp. 495, and the opinion of the court of appeals dismissing the interlocutory appeal from that decision is reported at 871 F.2d 444.

JURISDICTION

The judgments of the court of appeals were entered on February 8, 1990. A petition for rehearing was denied on March 13, 1990. The petition for writs of certiorari was filed on June 11, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On October 23, 1986, an indictment was returned in the Eastern District of Pennsylvania, charging petitioners and 17 others with racketeering (18 U.S.C. 1962(c)), racketeering conspiracy (18 U.S.C. 1962(d)), embezzling from a union welfare benefit plan (18 U.S.C. 664), and paying kickbacks to influence the operation of an employee welfare benefit plan (18 U.S.C. 1954).

On May 14, 1987, the case against petitioners Bloom and Fisher was severed. An eight-count superseding indictment, charging petitioners alone, was returned on January 21, 1988. Petitioners were charged with one count each of racketeering and racketeering conspiracy (Counts 1 and 2), paying a kickback to union officials to influence the operation of an employee welfare benefit plan (Count 3), and embezzling from a union welfare benefit plan (Count 6). Petitioner Fisher was also charged with two additional counts of paying kickbacks (Counts 4 and 5) and two additional counts of embezzling from a union welfare benefit plan (Counts 7 and 8).

Following a jury trial, petitioners were convicted on the one kickback count in which they were jointly charged (Count 3). They were acquitted on all other charges. Petitioners were each sentenced to terms of imprisonment of one year and one day. In addi-

tion, petitioner Fisher was fined $125,000, and petitioner Bloom was fined $25,000. The court of appeals affirmed. Pet. App. A1-A14.

The evidence at trial is summarized in the opinions of the court of appeals. Pet. App. A2-A3, A9-A10. Petitioners were partners in the law firm of Bloom, Ocks and Fisher. Petitioners' law firm was retained as the sole provider of legal services to eligible members of a welfare benefit plan operated on behalf of Roofers Union Locals 30/30B. The plan, which was funded pursuant to a collective bargaining agreement between the union and an association of roofing contractors, paid the law firm a fixed monthly amount. Petitioners were alleged to have participated in a ten per cent kickback of funds from the law firm to representatives of the plan for use in bribing local officials.

The evidence against petitioners grew out of a court-authorized electronic surveillance order, pursuant to which the FBI monitored conversations in the office of a union official and plan trustee and in the business agents' meeting room at the union hall. At petitioners' trial, the government relied on tapes of 33 conversations to show that petitioner Fisher unlawfully gave union officials ten per cent of the compensation that the plan paid to Bloom, Ocks and Fisher in 1983, 1984, and 1985. Petitioner Bloom was shown to be involved in the 1985 payment. The evidence against Bloom consisted mainly of intercepted conversations among Bloom, Fisher, and Stephen Traitz, Jr., a union official and trustee of the plan. Pet. App. A3, A10.[1]

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[1] Other conversations recorded by the FBI pursuant to court order resulted in the conviction of union officials for offenses including racketeering, mail fraud, solicitation of kickbacks,

ARGUMENT

1. Petitioners contend (Pet. 12-22) that the courts below erred in failing to suppress certain electronic surveillance evidence. The evidence should have been suppressed, they argue, because one of the court orders authorizing the electronic surveillance was facially insufficient.

Electronic surveillance was first authorized in an order dated September 23, 1985, which authorized federal agents to conduct surveillance for a period of 30 days. Pet. App. A18. The order was issued pursuant to the provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C, 2510 *et seq.* A second order, signed on October 24, 1985, authorized a 30-day extension of the electronic monitoring,[2] Petitioners argue that the October 24 order was facially insufficient under 18 U.S.C. 2518(10)(a)(ii) because a page was missing from the proposed order when it was signed by the authorizing judge. Pet. App. A21.

Both the district court and the court of appeals found that the absence of one page from the signed copy of the electronic surveillance order did not render the order invalid. The court of appeals relied on its previous decision upholding the validity of the same order, which was also challenged by petitioners' co-defendants. Pet. App. A11; *United States* v.

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embezzlement, bribery, extortion, and loan-sharking. See *United States* v. *Traitz*, 871 F.2d 368 (3d Cir.), cert. denied, 110 S. Ct. 78 (1989).

[2] As the court of appeals noted (Pet. App. A11), the most important evidence relating to the 1985 kickback consisted of recordings of meetings that occurred in November 1985, during this 30-day extension period.

Traitz, 871 F.2d 368 (3d Cir. 1989). This Court denied a petition for a writ of certiorari raising the same issue that is raised in this case. *Traitz* v. *United States*, cert. denied, 110 S. Ct. 78 (1989).

The missing page was page three of the October 24, 1985, extension order. The page was omitted, apparently through inadvertence, from the copy of the proposed order that was submitted to the authorizing judge for signature. As the district court explained in its memorandum denying petitioners' motions to suppress (Pet. App. A21-A23), the absence of that page from the order meant that the order did not contain language reflecting two of the findings the authorizing judge was required to make under 18 U.S.C. 2518(3): a finding that normal investigative procedures had been tried and had failed or appeared to be unlikely to succeed; and a finding that there was probable cause to believe that the facilities from which, or the place where, the communications were to be intercepted were being used or were about to be used in connection with the commission of the specified offense. 18 U.S.C. 2518(3)(c) and (d).

The district court determined that the absence of a written recitation of the two required findings did not invalidate the order, because the court could determine that the authorizing judge had made those findings, and because there was no requirement that the findings be set out in writing. Pet. App. A22-A26. The district court noted that the authorizing judge's signature on the order was an indication that he had considered the application and supporting affidavits for an interception order. Moreover, the October 24 surveillance order stated that the court had given "full consideration . . . to the matter set

forth" in the application, and that the application had been made to the court under oath by the Assistant United States Attorney. Pet. App. A23.

The court of appeals affirmed. Referring to its previous consideration of the same issue in *United States* v. *Traitz*, *supra*, the court of appeals reiterated its conclusion that an electronic surveillance order is valid where, as here, an examination of the supporting documentation supports the conclusion that the authorizing judge made all the findings required by the statute. Pet. App. A11.

In its opinion in the *Traitz* case, the court of appeals first determined, as had the district court, that nothing in the statute requires that the findings mandated by 18 U.S.C. 2518(3) must be in writing. 871 F.2d at 376-377. That conclusion is consistent with the case law on the point, and petitioners cite no contrary authority. See *United States* v. *Martinez*, 588 F.2d 1227, 1233 (9th Cir. 1978) (judge not required to make specific findings of fact under 18 U.S.C. 2518(3)); *United States* v. *Tortorello*, 342 F. Supp. 1029, 1036 (S.D.N.Y. 1972) (Section 2518 (3)(c) does not require that particular words be used in the finding or that the finding be expressed in words rather than by the act of the judge), aff'd, 480 F.2d 764 (2d Cir.), cert. denied, 414 U.S. 866 (1973); *United States* v. *Escandar*, 319 F. Supp. 295, 304 (S.D. Fla. 1970) ("Section 2518(3) requires only that the authorizing judge make a determination that normal investigative procedures have been tried [or] appear likely to fail. There is no specific mandate that such determination be reflected in the written order.").

The court of appeals further concluded that the authorizing judge's act of signing the order was

sufficient evidence that the judge made the findings required by the Act, in light of the supporting documentation for the order, which was concededly proper and complete. 871 F.2d at 377-378; see *United States* v. *Martinez*, 588 F.2d at 1233; *United States* v. *Armocida*, 515 F.2d 29 (3d Cir.), cert. denied, 423 U.S. 858 (1975). Petitioners complain (Pet. 14, 17) that the absence of one page from the order is a conclusive indication that the reviewing judge did not read the order and so could not have made the kind of judicial findings the statute requires. As the court of appeals stated, however, it is not the order that must be examined in order to determine whether the judge properly performed his function under the statute, but the application and affidavit that were submitted in support of the order. 871 F.2d at 378; *United States* v. *Ford*, 553 F.2d 146, 165-166 (D.C. Cir. 1977).

The other four interception orders in this case, all of which were conceded to be valid, set forth in writing each of the findings required by Section 2518(3). After examining those orders, the court of appeals concluded that the supporting documentation must be consulted in any case in order to review the propriety of the district court's approval of the wiretap application. The court of appeals explained (871 F.2d at 377-378):

> In each of these four orders the district court's findings simply tracked the language of § 2518 (3)(a)-(d). Such bald recitations do little to aid this Court in assessing the propriety of the district court's order. Instead, requiring the district court to set forth its findings in writing would promote form over substance and would create a requirement, amounting to a trap for

the unwary, where none was apparently on the mind of Congress.

Petitioners' reliance on this Court's decisions in *United States* v. *Giordano*, 416 U.S. 505 (1974), and *United States* v. *Chavez*, 416 U.S. 562 (1974), is misplaced. As the court of appeals pointed out in its opinion in *Traitz*, those cases referred to the findings the judge must make under Section 2518(3), but neither case addresses the question whether those findings must be made in writing. *United States* v. *Giordano*, 416 U.S. at 514; *United States* v. *Chavez*, 416 U.S, at 564.

Nor does this Court's recent decision in *United States* v. *Ojeda Rios*, 110 S. Ct. 1845 (1990), aid petitioners' argument. In *Ojeda Rios* the Court was called upon to interpret language in 18 U.S.C. 2518 (8)(a) referring to the requirement that the products of court-authorized electronic surveillance be sealed immediately or that a "satisfactory explanation" be provided for the absence of such a seal. The Court concluded that the statutory language required a "satisfactory explanation" of delays in sealing as well as the absence of the required seal. In this case, by contrast, there is no statutory language mandating that the authorizing judge make in writing the findings required by Section 2518(3). In this case, unlike in *Ojeda Rios*, there is therefore no argument available to petitioners that there has been a violation of the explicit terms of the Act.

Contrary to petitioners' assertion, there is no conflict between the decision in this case and the decision of the Sixth Circuit in *United States* v. *Lamonge*, 458 F.2d 197, cert. denied, 409 U.S. 863 (1972). The court in that case found that undated wiretap orders were invalid on their face, but there

the omission in the authorization fell afoul of a specific requirement in 18 U.S.C. 2518(4)(e), *i.e.*, that the surveillance order shall specify "the period of time during which such interception is authorized." Here, the omission in the order did not result in a failure to comply with any of the dictates of the statute.

Petitioners also argue (Pet. 18-22) that the decision of the court of appeals in this case is contrary to the Fourth Amendment, because it amounts to holding that there need be no detached scrutiny of a warrant application by a neutral magistrate, only blind acceptance by the judge of the prosecutor's judgment. Petitioners, however, base that argument on their conclusion that the omission of a page from the extension order shows the issuing judge could not have read the order, and on their further conclusion that the judge therefore did not review the surveillance application. Both courts below found no basis for such a conclusion. Instead, they found sufficient evidence from an examination of all the circumstances in the case that the judge did in fact perform the required review. As the court of appeals concluded, there was no basis in this case for finding that the district court " 'rubber stamped' the government's request without exercising its independent judgment." *United States* v. *Traitz*, 871 F.2d at 378.

2. Petitioner Bloom claims (Pet, 22-24) that the court of appeals erred in finding the evidence sufficient to support his conviction for payment of a kickback. He claims that the court of appeals affirmed his conviction on an agency theory, which was not included in the jury instructions, and that the evidence did not establish that he engaged in the kind of conduct necessary to constitute aiding and abetting.

In the portion of its opinion concerning the sufficiency of the evidence against Bloom, the court of appeals described a meeting that occurred on November 21, 1985, among Bloom, Fisher, and Traitz. The court found that the main topic of the conversation was the payment of a kickback, and it noted that Fisher's use of the words "we" and "us" supported a conclusion that "Fisher spoke on behalf of Bloom when he acknowledged having paid money to Traitz previously during the year and promised to continue the payments." Pet. App. A6. The court further noted that Bloom asked Traitz if he had had his office checked for electronic surveillance devices, and that the inference could be drawn "that Bloom had made two previous efforts to discuss the kickback." *Ibid.* Finally, at the end of the conversation, the court stated, Traitz again asked for the kickback, From this evidence, the court found, "the jury properly could have determined that Fisher and Bloom acted in concert and that the recorded payments made on December 3 and 17, 1985 were made on behalf of both defendants." *Ibid.*

From this review of the evidence, petitioner contends that the court of appeals improperly upheld his conviction based only on his presence and guilty knowledge. Petitioner's argument, however, ignores the nature of the evidence against Bloom, and it misinterprets the findings of the court of appeals. Bloom's participation in the November 21 conversation showed more than just guilty knowledge of Fisher's payment of kickbacks; it showed Bloom's own involvement in those payments. Fisher and Bloom spoke in tandem about the kickback and when it would be paid, finishing each other's sentences as they explained when they expected to complete the

payment, C.A. App. 248a. Fisher continued, explaining the amounts that he said "we" had paid Traitz before and how they would make the remaining payments: "And we'll make up, between now . . . It'll take us two weeks, part next week, part the week after." C.A. App. 249a. When the court of appeals described the evidence as showing that petitioners "acted in concert" and that the payments "were made on behalf of both defendants," Pet. App. A6, it was not suggesting that Bloom was guilty of the substantive offense only by virtue of his participation in a conspiracy, or that he was merely aware of actions taken by Fisher alone. Rather, the court clearly meant that Bloom revealed in the recorded conversation that he was an active partner in the substantive offense of paying the kickback, and that he and Fisher were acting together to make the payments. The finding of the court of appeals was consistent with the evidence presented at trial, the jury instructions, and the law on aiding and abetting.

CONCLUSION

The petition for writs of certiorari should be denied.

Respectfully submitted.

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